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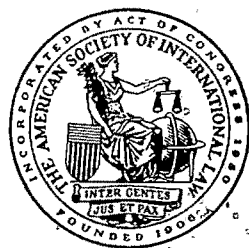
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# *American Journal of International Law*

(109)

*January 1986*  
*Vol. 80 No. 1*



*Published by*

*American Society of International Law*

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Postmaster: If undeliverable, send notice on Form 3579 to: American Journal  
of International Law

2223 Massachusetts Ave., N.W. Washington, D.C. 20008

Printed by Lancaster Press, Lancaster, Pa. 17604

Editorial office: New York University School of Law, New York, N.Y. 10012

# AMERICAN JOURNAL OF INTERNATIONAL LAW

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5002

VOL. 80

January 1986

NO. 1

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AJIL is published in January, April, July, and October and is supplied to all members of the American Society of International Law. The annual subscription to nonmembers of ASIL is \$50.00, plus \$3.20 for all foreign subscriptions. Available back numbers of AJIL will be supplied at \$11.00 each. (\$30 of membership fee is allotted to AJIL subscription.)

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NEW YORK UNIVERSITY SCHOOL OF LAW  
40 WASHINGTON SQUARE SOUTH  
NEW YORK, N.Y. 10012

BUSINESS OFFICE:  
2223 MASSACHUSETTS AVENUE, N.W.  
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Extrapolating from *Barcelona Traction* into the field of international criminal responsibility, the ILC adopted<sup>8</sup> on first reading the controversial Article 19(3)(c) of the draft articles on state responsibility proposed by the special rapporteur, Professor (now Judge) Ago. Article 19(3)(c) provides that an international crime may result, inter alia, from "a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*." For international crimes, the ILC thus introduced a twofold test relating to the seriousness both of the violation and of the norm.

More recently, in discussing derogations from human rights, a United Nations document spoke of the "intangibility of certain fundamental rights."<sup>9</sup> The UN Secretary-General complained of the denial by South Africa of the "most fundamental human rights."<sup>10</sup> And the authoritative draft *Restatement of the Foreign Relations Law of the United States (Revised)* considers the rules of customary law of human rights listed in section 702 (discussed in section IV below) to constitute *jus cogens*.<sup>11</sup>

Claims of hierarchical status are also raised as to the relationship among rights belonging to the so-called first generation (civil and political rights), second generation (economic, social and cultural rights) and third generation (solidarity rights, e.g., the rights to peace, development and a protected environment).<sup>12</sup> Perhaps because, as Professor Brownlie aptly observes, "there is no Rubicon between law and morality,"<sup>13</sup> in the largely political controversy over the ranking of the several generations of rights (the first two generations represent *lex lata*, the third largely still *lex ferenda*), little attention is paid to the distinction between rights and claims. Yet another priority claim arises in distinguishing between individual and collective rights: the Canadian expert on the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (Deschênes) recently called for an end to the suppression of individual rights in the name of collective rights.<sup>14</sup>

<sup>8</sup> *Id.* at 73. For the text of Article 19(3)(c), see *id.* at 95.

<sup>9</sup> UN Doc. E/CN.4/Sub.2/1985/19, at 6.

<sup>10</sup> UN Press Release (Geneva) No. SG/SM/617, July 24, 1985.

<sup>11</sup> RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §702 comment 1 (1 Tent. Draft No. 6, 1985) [hereinafter cited as DRAFT RESTATEMENT].

<sup>12</sup> See generally Sohn, *The New International Law: Protection of the Rights of Individuals rather than States*, 32 AM. U.L. REV. 1, 61-62 (1982). Regarding the interdependence and equal status of human rights, see *id.* at 63. See also Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 AJIL 607, 612 (1984).

<sup>13</sup> Brownlie, *Causes of Action in the Law of Nations*, 50 BRIT. Y.B. INT'L L. 13, 40 (1979).

<sup>14</sup> UN Press Release (Geneva) No. HR/1735, Aug. 7, 1985, at 2. See generally Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 12, 331-32 (1982 V); Humphrey, *Political and Related Rights*, in 1 INTERNATIONAL LAW OF HUMAN RIGHTS: LEGAL AND POLICY ISSUES 171, 171-74 (T. Meron ed. 1984); Shestack, *The Jurisprudence of Human Rights*, in *id.* at 69, 99-101; van Boven, *Distinguishing Criteria of Human Rights*, in 1 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 43, 53-57 (K. Vasak ed., P. Alston Eng. ed. 1982); Marks, *Emerging Human Rights: A New Generation for the 1980s?*, in INTERNATIONAL LAW: A TEMPORARY PERSPECTIVE 501 (R. Falk, F. Kratochwil & S. Mendlovitz eds. 1985); Vasak, *Pour une Troisième Génération des Droits de l'Homme*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET 837 (C. Swinarski ed. 1984); Alston, *supra* note 12.

from the attributes of human beings" in its Preamble, but simply rights and freedoms in its body.

Nevertheless, the literature of international human rights demonstrates that some observers believe that there is a substantive difference between fundamental human rights and other human rights. One of these observers, Professor van Boven, alluding to the term "fundamental human rights" in the Charter, emphasizes the "supra-positive" character of such rights,<sup>26</sup> suggesting, perhaps, that they are based on natural law. However, whether this term brings any significance to bear on the question of a hierarchy of norms in positive international law is not clear. The author states that the principle of nondiscrimination on grounds of race has been "upgraded" "on the hierarchical scale of human rights norms," but he qualifies this claim by adding "in so far as there is any such scale."<sup>27</sup> Because it is not certain that the prohibition of some forms of racial discrimination would prevail over other human rights in case of a conflict,<sup>28</sup> can one really speak here of a hierarchical relationship?

The draft *Restatement* contains an important instance of a distinction between fundamental rights and other rights: section 702(g) mentions "consistent patterns of gross violations of internationally recognized human rights" as a violation of customary international law. This formulation results from the grafting of language from United States legislation<sup>29</sup> onto that of ECOSOC Resolution 1503 (XLVIII).<sup>30</sup> Comment *k* to section 702 states that "[w]hile all the rights proclaimed in the Universal Declaration and protected by the . . . Covenants . . . are internationally recognized human rights, some rights are fundamental and intrinsic to human dignity, and consistent patterns of violation of such rights as state policy may be deemed 'gross' *ipso facto*." Comment *k* thus suggests that when a pattern of violations of certain rights has reached a critical mass, it may be regarded as a breach of customary international law. But would this proposition not hold true also if applied to all internationally recognized human rights, rather than to "fundamental rights" only?

The lack of generally agreed standards makes it extremely difficult to select such fundamental rights. To illustrate: among the fundamental rights listed in comment *k* to section 702 is the right to leave one's country. Nevertheless, this right, considered *ut singuli*, is not listed among the customary human rights in the black-letter text of section 702. This writer agrees with the drafters of the *Restatement* that the right to leave is fundamental. Yet the relativity of our perceptions is emphasized by the fact that in a recent study prepared for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Rapporteur Mubanga-Chipoia, discussing the

<sup>26</sup> Van Boven, *supra* note 14, at 44.

<sup>27</sup> *Id.*

<sup>28</sup> See generally Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AJIL 283, 296-305 (1985).

<sup>29</sup> DRAFT RESTATEMENT, *supra* note 11, §702 Reporters' Note 9 (listing examples of relevant U.S. statutes); Schachter, *International Law Implications of U.S. Human Rights Policies*, 24 N.Y.L. SCH. L. REV. 63, 75 (1978); Meron, *Teaching Human Rights: An Overview*, in 1 Meron (ed.), *supra* note 14, at 1, 20 & nn.98-100.

<sup>30</sup> 48 UN ESCOR Supp. (No. 1A) at 8-9, UN Doc. E/4832/Add.1 (1970).

particular national society? If the latter, account must be taken of the deplorable fact that some societies will not yet accept the goal of women's equality as a fundamental right.

The term "fundamental rights," which inspired the development of international human rights, originated in national constitutions,<sup>35</sup> where it continues to be commonly employed. It is in this sense that the Court of Justice of the European Communities spoke of "fundamental rights [which] form an integral part of the general principles of the law" and of "the fundamental rights recognized by the constitutions [of member states]."<sup>36</sup> In national legal systems, fundamental or constitutional rights are characterized by the especially rigorous procedures required for their adoption, amendment or termination, and by their superior position in the hierarchy of legal norms. In case of conflict, a subordinate norm must yield to a constitutional norm and its legal validity may even perhaps be questioned.

None of these characteristics can be found in the notion of fundamental human rights. In its commentary on Article 17 of the draft articles on state responsibility, the ILC has already warned that

only by erroneously equating the situation under international law with that under internal law . . . some lawyers have been able to see in the "constitutional" or "fundamental" principles of the international legal order an independent and higher "source" of international obligations. In reality there is, in the international legal order, no special source of law for creating "constitutional" or "fundamental" principles. The principles which come to mind when using these terms are themselves customary rules, rules embodied in treaties, or even rules emanating from bodies or procedures which have themselves been established by treaties. Consequently, the view that international responsibility generated by a breach of certain obligations established by those principles is more grave, cannot be justified on the basis of their "origin", but rather by taking account of the undeniable fact that the international community has a greater interest in ensuring that its members act in accordance with the specific requirements of the obligations in question.<sup>37</sup>

While it is true that the determination of the "greater importance" of some obligations should be the function of the international community, as suggested by the ILC, in the absence of effective institutional procedures for making such a determination and given the continued elusiveness of international consensus, the characterization of some rights as fundamental results largely from our own subjective perceptions of their importance. Perhaps they are marked by a special *erga omnes* character, as was suggested by the Court in *Barcelona Traction*. We shall see, however, that the *erga omnes*

<sup>35</sup> See generally Schindler, *The International Committee of the Red Cross and Human Rights*, INT'L REV. RED CROSS, No. 208, Jan.-Feb. 1979, at 3, 6.

<sup>36</sup> *Hauer v. Land Rheinland-Pfalz*, 1979 ECR 3727, 3744-45, 29 Common Mkt. L.R. 42, 64 (1980 III).

<sup>37</sup> [1976] 2 Y.B. INT'L L. COMM'N, *supra* note 7, pt. 2 at 73, 85-86.

character is no longer the exclusive attribute of fundamental rights. Moreover, being *erga omnes* is a consequence, not the cause, of a right's fundamental character. The *erga omnes* criterion is therefore unhelpful for characterizing rights as fundamental or ordinary.

For those fundamental rights which overlap with *jus cogens*, of course, Articles 53 and 64 of the Vienna Convention on the Law of Treaties<sup>38</sup> suggest certain analogies with higher, constitutional norms in national legal systems, but this is because of their being "peremptory" rather than fundamental. While it is true, as the ILC pointed out in its commentary on Article 50 (now 53) of the Vienna Convention on the Law of Treaties, that "[i]t is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may . . . give it a character of *jus cogens*,"<sup>39</sup> it is difficult to accept the ILC's suggestion, made in the commentary on Article 17 of the draft articles on state responsibility, that the "process by which [such rules] were created" is irrelevant.<sup>40</sup> Process is relevant for the acceptance of a rule of *jus cogens*, which requires a very large majority of states ("the international community as a whole"), and even more for the establishment of a subsequent norm of general international law having the character of *jus cogens* and modifying an earlier rule of *jus cogens* (*jus cogens superveniens*). Can a subsequent rule of *jus cogens* modifying an earlier rule of *jus cogens* be established through practice and customary law that is in conflict with the earlier rule, or by a general multilateral treaty as suggested by the ILC?<sup>41</sup> What would the significance be of practice or customary law that is being crystallized in conflict with existing rules of *jus cogens*? Neither the scant international practice nor the richer doctrine has given fully satisfactory answers to this question.

If a fundamental right may constitute a peremptory right, the difficulty of identifying fundamental rights gives way to the even greater difficulty of qualifying certain rights as peremptory. Because invalidity of a norm may result from its conflict with *jus cogens*, this qualification is a formidable, even awesome task. For the scholar as well as the practitioner, it requires discharging a heavy burden of proof.

A catalog of "fundamental human rights" can, of course, be established by a future agreement or, perhaps, developed through international practice and jurisprudence. Such a catalog should not be confused with lists of non-

<sup>38</sup> Opened for signature May 23, 1969, UNTS Regis. No. 18,232, UN Doc. A/CONF.39/27 (1969), reprinted in 63 AJIL 875 (1969), 8 ILM 679 (1969).

<sup>39</sup> [1966] 2 Y.B. INT'L L. COMM'N 169, 248, UN Doc. A/CN.4/SER.A/1966/Add.1.

<sup>40</sup> [1976] 2 *id.*, *supra* note 7, pt. 2 at 85.

<sup>41</sup> [1966] 2 *id.*, *supra* note 39, at 248. Sir Ian Sinclair has questioned the status of a new multilateral treaty which, at the time of its conclusion, would be in conflict with an earlier rule of *jus cogens*. I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 226 (2d ed. 1984). But would such a conflict arise where the international community has accepted, through a very large majority's support for a new general multilateral treaty, the formulation of a new rule of *jus cogens*? Would such acceptance not indicate the emergence of a new rule of *jus cogens* and the modification of the previous rule of *jus cogens* even before the entry into force of the new treaty?

derogable rights and their relationship with *jus cogens*, to be discussed later in this essay.

Account must be taken, however, of the following important, but ambivalent, dictum by the International Court of Justice in its Judgment in the *Barcelona Traction* case:<sup>42</sup>

33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . . ; others are conferred by international instruments of a universal or quasi-universal character.<sup>43</sup>

The above pronouncement does not make clear, however, whether "basic rights of the human person," which give rise to obligations *erga omnes*, are synonymous with human rights *tout court* or are limited to rights intimately associated with the human person and human dignity and generally accepted, such as the protection from slavery and racial discrimination. Moreover, the distinction between basic rights of the human person and "ordinary" human rights is not self-evident. If the Court intended to set apart the basic rights of the human person, the inclusion of some human rights among them would perhaps depend on their acceptance into the corpus of general international law or on their incorporation into instruments of a universal or quasi-universal character; but a more subjective and difficult characterization would also have to be made, such as the nature of their association with the human person and human dignity.

Elsewhere in the Judgment, an indication can, indeed, be found that the Court intended to distinguish between human rights in general and the basic rights of the human person. The Court emphasized that, in contrast to the European Convention, "which entitles each State which is a party to the Convention to lodge a complaint against any other contracting State for violation of the Convention, irrespective of the nationality of the victim,"<sup>44</sup> "on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such

<sup>42</sup> 1970 ICJ REP. 4, *supra* note 5.

<sup>43</sup> *Id.* at 32.

<sup>44</sup> *Id.* at 47.

rights irrespective of their nationality."<sup>45</sup> The Court seems to suggest that, while basic rights of the human person give rise to obligations *erga omnes* and are appropriate for protection by states regardless of the nationality of the victim, other human rights, or ordinary human rights, can be espoused, under the agreements embodying such rights, only by the state of nationality of the victims.

This pronouncement of the Court will obviously create some perplexity when the need arises to characterize human rights as either ordinary or basic. Most observers would probably agree that protection of the right to life from arbitrary taking and protection of the human person from torture or egregious racial discrimination are fundamental rights. Perhaps they would also agree that the small number (irreducible core) of rights that are deemed nonderogable under both the Political Covenant<sup>46</sup> and the European and American Conventions constitute fundamental, and perhaps even peremptory norms. But that irreducible core comprises four rights only: the right to life and the prohibitions of slavery, torture and retroactive penal measures. The prospects for a consensus reaching beyond these few rights are not immediate. For instance, while for some observers, including this writer, due process rights are fundamental and indispensable for ensuring any other right, for others, the rights to food and other basic needs take precedence. Superficially seductive formulae such as the notion of rights protecting the physical and mental well-being of the human person are not helpful either, because they involve clusters of rights whose components require scrutiny. Would the prohibition of indefinite preventive detention, for example, be considered fundamental?

One point is clear, however. The Court's reference to the body of general international law and to universal or quasi-universal agreements suggests that a fundamental right must be firmly rooted in international law and that mere claims or goals, important as they may be, would not qualify.

Protection from slavery and racial discrimination, the examples of basic human rights mentioned by the Court, may well reflect its conception of norms of *jus cogens*, which it did not explicitly spell out; but rights characterized by an *erga omnes* reach are not necessarily identical with *jus cogens*. Despite a certain overlap, the latter is narrower than the former.

Since the Judgment of the Court, and perhaps under the impact of that Judgment, there has been a growing acceptance in contemporary international law of the principle that, apart from agreements conferring on each state party *locus standi* against the other state parties, all states have a legitimate interest in and the right to protest against significant human rights violations wherever they may occur, regardless of the nationality of the victims. This crystallization of the *erga omnes* character of human rights, rooted in Articles 55 and 56 of the Charter, is taking place despite uncertainty as to whether a state not directly concerned (e.g., in the protection of its nationals), *ut singuli*, may take up claims against the violating state<sup>47</sup> and demand

<sup>45</sup> *Id.*

<sup>46</sup> GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966).

<sup>47</sup> I. SINCLAIR, *supra* note 41, at 213; Schachter, *supra* note 14, at 196-99, 341-42.



reparation for a breach of international law. However, the general principle establishing international accountability and the right to censure can be regarded as settled law.<sup>48</sup> Thus, while doubts may persist about the appropriate remedies that can be demanded by a third state that does not have a direct interest in the matter, subject to the acceptance by the states concerned of the jurisdiction of a competent tribunal, the *locus standi* of such a third state, in principle, is not questioned.

The most interesting feature of this development is that the growing acceptance of the *erga omnes* character of human rights has not been limited to the basic rights of the human person. Thus, section 703(2) of the draft *Restatement*<sup>49</sup> provides that any state may pursue international remedies against any other state for a violation of the customary international law of human rights. In their notes, the reporters elaborate as follows:

The customary law of human rights . . . protects individuals subject to each state's jurisdiction, and the international obligation runs equally to all other states, with no one state a victim of the violation more than any other. If there is to be any remedy at all, it must be available equally to all states.<sup>50</sup>

The *erga omnes* character of human rights is also suggested by Article 5(d)(iv) of the draft articles on state responsibility (part 2), proposed by the ILC's special rapporteur, Professor Riphagen, which states:

For the purposes of the present articles "injured State" means:

(d) if the internationally wrongful act constitutes a breach of an obligation imposed by a multilateral treaty, a State party to that treaty, if it is established that:

(iv) the obligation was stipulated for the protection of individual persons, irrespective of their nationality.<sup>51</sup>

While the above provision concerns obligations imposed by treaties,<sup>52</sup> it is

<sup>48</sup> See generally Schachter, *supra* note 29, at 66-74; Schachter, *supra* note 14, at 200.

<sup>49</sup> DRAFT RESTATEMENT, *supra* note 11. <sup>50</sup> *Id.* §703 Reporters' Note 3.

<sup>51</sup> Report of the International Law Commission on the work of its thirty-sixth session, 39 UN GAOR Supp. (No. 10) at 237 n.299, UN Doc. A/39/10 (1984); Report of the International Law Commission on the work of its thirty-seventh session, 40 UN GAOR Supp. (No. 10) at 39, UN Doc. A/40/10 (1985).

<sup>52</sup> UN Doc. A/CN.4/389, at 9 (1985). In 1985, the ILC amended Article 5(d)(iv) of the Riphagen draft, emphasizing that the principle stated in it applied to international customary law as well. The relevant part of Article 5 as provisionally adopted by the ILC reads as follows:

2. In particular, "injured State" means

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(iii) the right has been created or is established for the protection of human rights and fundamental freedoms. . . .

noteworthy that the distinction between basic rights of the human person and ordinary human rights is not addressed.

In a recent statement, the UN Assistant Secretary-General for Human Rights, Dr. Kurt Herndl, emphasized that one of the accomplishments of the United Nations has been to consolidate the principle that human rights are a matter of international concern that the international community is entitled to discuss.<sup>53</sup> Scholarly writings point in the same direction. Thus, in an important study of international accountability and the right to censure human rights violations, Professor Schachter does not distinguish between the basic rights of the human person and human rights *tout court*. He points out, rightly, that in the absence of specific interests of their own, states tend to focus on censuring violations of "fundamental norm[s] of humanity."<sup>54</sup> This tendency, however, appears to reflect considerations of foreign policy and an assessment of the significance of the breach, rather than a formal distinction between fundamental rights and ordinary rights.

In sum, international practice and scholarly opinion seem to have moved well beyond the *erga omnes* dictum of *Barcelona Traction*: perhaps the distinction between basic human rights and human rights *tout court*, as regards their *erga omnes* character, can no longer be supported. We shall see, however, that despite the acknowledged vagueness of the term,<sup>55</sup> the Institute of International Law has carried the notion of basic rights of the human person even further into the uncertain terrain of *jus cogens*.

#### IV. *JUS COGENS*

The notion of peremptory norms of international law (*jus cogens*) is stated in Articles 53 and 64 of the Vienna Convention on the Law of Treaties. Article 53 provides as follows:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of

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Report of the International Law Commission on the work of its thirty-seventh session, *supra* note 51, at 54. The commentary explained that "[t]he term 'human rights and fundamental freedoms' is here used in the sense which is current in present-day international relations." *Id.* at 58.

<sup>53</sup> UN Press Release (Geneva) No. HR/1733, Aug. 6, 1985, at 2.

<sup>54</sup> Schachter, *supra* note 29, at 70. Principle 2 of the Principles for the International Law of the Future emphasized the duty of each state to "treat its own population in a way which will not violate the dictates of humanity and justice or shock the conscience of mankind." 38 AJIL Supp. 72, 74 (1944). These terms can be traced to the preambular Martens clause to (Hague) Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, TS No. 539. See Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AJIL 589, 593 & n.24 (1983).

<sup>55</sup> See, e.g., Suy, *Droit des Traités et Droits de l'Homme*, in *VÖLKERRECHT ALS RECHTSORDNUNG—INTERNATIONALE GERICHTSBARKEIT—MENSCHENRECHTE: FESTSCHRIFT FÜR HERMANN MOSLER* 935, 936-37 (R. Bernhardt, W. Geck, G. Jaenicke & H. Steinberger eds. 1983); I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 512 (3d ed. 1979).

States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The literature on *jus cogens* is rich.<sup>56</sup> For our purposes, only a few observations narrowly focused on human rights are called for.

The principle of *jus cogens*, which restricts the freedom of states to contract and voids instruments that conflict with peremptory norms, has unquestionable ethical underpinnings and unimpeachable antecedents. It may be traced to the distinction in Roman law between *jus strictum* and *jus dispositivum* and to Grotius's references to *jus strictum*.<sup>57</sup> Its moral and deterrent effect is of particular importance in our era, characterized as it is by internal and international violence and frequent breaches of most human rights. But even for those who accept it, as this author does, this principle gives rise to difficult questions.

First, in the contemporary world, what is the relevance of *jus cogens* to agreements implicating human rights? As a matter of fact, states do not conclude agreements to commit torture or genocide or enslave peoples. Many of the examples of *jus cogens* commonly cited in legal literature are really *hypothèses d'école*. Moreover, states are not inclined to contest the absolute illegality of acts prohibited by the principle of *jus cogens*. When such acts take place, states deny the factual allegations or justify violations by more subtle or ingenious arguments. Thus, while the principle of *jus cogens* has moral and potential value, its immediate practical importance for the validity of agreements is still limited. However, when it comes to balancing one human right that has assumed the status of *jus cogens* against another human right that has not gained such exalted status, the concept may be relevant.

A second set of questions stems from the continuing lack of agreement about the peremptory rules themselves. The International Law Commission, which prepared the draft of the Vienna Convention, has prudently refrained from suggesting a catalog of peremptory rules. Few attempts have been made to identify such rules in the field of human rights. Invoking the authority of Professors McDougal, Lasswell and Chen,<sup>58</sup> comment 1 to section

<sup>56</sup> See I. SINCLAIR, *supra* note 41, at 203-26, and the literature mentioned in *id.* at 236 n.8; Weil, *supra* note 1; Whiteman, *Jus Cogens in International Law, With a Projected List*, 7 GA. J. INT'L & COMP. L. 609 (1977); Domb, *Jus Cogens and Human Rights*, 6 ISRAEL Y.B. HUM. RTS. 104 (1976); Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AJIL 946 (1967); Gros Espiell, *Self-Determination and Jus Cogens*, in UN LAW/FUNDAMENTAL RIGHTS 167 (A. Cassese ed. 1979).

<sup>57</sup> Frowein, *Jus Cogens*, [Instalment] 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 327, 328 (R. Bernhardt ed. 1984).

<sup>58</sup> M. McDUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 338-50 (1980). The authors state that "many of the policies about human rights would appear to be so intensely demanded that they are acquiring . . . not merely the status of 'international concern,' but in addition that of *jus cogens* or of a global bill of rights." *Id.* at 185. They regard the Universal Declaration of Human Rights "as established customary law, having the attributes of *jus cogens*." *Id.* at 274. They suggest that "the great bulk of the contemporary human rights descriptions" are identifiable as *jus cogens*. *Id.* at 345. The view of these learned authors finds

702 of the draft *Restatement*<sup>59</sup> states that the prohibitory rules of customary international law carefully listed in that section constitute *jus cogens* and that an international agreement that violated them would be void. The following prohibitions are so listed: genocide; slavery or slave trade; murder or causing the disappearance of individuals; torture or other cruel, inhuman or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and consistent patterns of gross violations of internationally recognized human rights;<sup>60</sup> all of which constitute violations if practiced as a matter of state policy. To this list, one should perhaps add certain norms of international humanitarian law. Considering the difficulties inherent in this subject, it is not surprising that in a study prepared in 1977, Whiteman compiled a significantly different and shorter list of peremptory human rights.<sup>61</sup> Because the prohibition of prolonged arbitrary detention is not mentioned among the nonderogable rights in Article 4 of the Political Covenant, the *Restatement's* identification of that prohibition as a rule of *jus cogens* creates a particularly difficult problem.<sup>62</sup>

The relationship between *jus cogens* and derogability is an interesting one. The principal human rights instruments (the Political Covenant, the American Convention, the European Convention) contain the same hard core of nonderogable rights, yet different lists of nonderogable rights. Rights that

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support in the statement of Judge Tanaka that "the law concerning the protection of human rights may be considered to belong to the *jus cogens*," *South West Africa (Ethiopia v. S. Afr.; Liberia v. S. Afr.)*, Second Phase, 1966 ICJ REP. 250, 298 (Judgment of July 18) (Tanaka, J., diss. op.). Also, Verdross argues that "all rules of general international law created for a humanitarian purpose" constitute *jus cogens*. Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AJIL 53, 59 (1966).

Sinclair, who disagrees with the attempts to regard all human rights as *jus cogens*, asks whether rights subject to progressive realization under Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (Economic Covenant) can constitute *jus cogens*. I. SINCLAIR, *supra* note 41, at 217. For the text of the Economic Covenant, see GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966). For a view that not all human rights are *jus cogens*, see also Schachter, *supra* note 14, at 339; Higgins, *Derogations under Human Rights Treaties*, 48 BRIT. Y.B. INT'L L. 281, 282 (1976-77).

<sup>59</sup> DRAFT RESTATEMENT, *supra* note 11, Reporters' Note 10; see also 2 *id.* §331(2) comment *e* and Reporters' Note 4. See generally Schachter, *supra* note 14, at 333-38.

<sup>60</sup> A later draft omitted "consistent patterns of gross violations of internationally recognized human rights" from the list of peremptory norms. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §702 comment *n*, Reporters' Note 10 (Tent. Final Draft, 1985) [hereinafter cited as Tent. Final Draft].

<sup>61</sup> Whiteman, *supra* note 56, at 625-26.

<sup>62</sup> It is suggested that detentions occurring during a time of emergency and that comply with the requirements of Article 4 of the Political Covenant are not arbitrary. Tent. Final Draft, *supra* note 60, §702 Reporters' Note 10. But the requirements of Article 4 are addressed primarily to the conditions for the proclamation of an emergency, not the standards governing detention procedures (due process). The notion of arbitrariness must refer to the character of the procedures of detention themselves, rather than only to the legality of the state of emergency under which they are authorized. Is there not a danger that the suggestion made in Reporters' Note 10 might be invoked to support the claim that every detention that takes place in a time of emergency in compliance with Article 4 is nonarbitrary, despite the prevalence of arbitrary detentions in such situations?

are nonderogable under such instruments are not necessarily *jus cogens* (e.g., the right not to be imprisoned merely on the ground of inability to fulfill a contractual obligation, which is stated in Article 11 of the Political Covenant, or perhaps the more important nonderogable right to participate in government, which is stated in Article 23 of the American Convention) and some of them may not even have attained the status of customary law. Conversely, can a right whose derogation is permitted by a primary international human rights agreement (the Political Covenant) be regarded as *jus cogens* in light of the statement of the principle of *jus cogens* in Article 53 of the Vienna Convention (a norm from which no derogation is permitted)?

The existence of nonderogable rights is cited by some writers as evidence of "at least a minimum catalogue of fundamental or elementary human rights."<sup>63</sup> In an important essay, Professor Suy carries this argument further into the field of the public order of the international community, which is somewhat analogous to *jus cogens*, and to which we shall return later in this essay:

L'interdiction formelle de toute dérogation nous paraît en effet être un critère objectif permettant d'identifier une règle relevant de l'ordre public de la communauté internationale. En appliquant ce critère, non seulement on sera amené à exclure du champ de cet ordre public tous les droits de l'homme auxquels il est expressément permis de déroger, mais on y fera aussi rentrer toutes les normes auxquelles il n'est pas permis de déroger qu'elles aient trait ou non aux droits de l'homme.<sup>64</sup>

While the first part of Professor Suy's suggestion is perfectly correct, the second is true only with regard to states contractually bound to a particular list of nonderogable rights. Since the reference to the public order of the international community is to general international law, the fact that a particular right is stated in a particular instrument, even one as important as the Political Covenant, is not necessarily conclusive.

While most nonderogable rights are of cardinal importance, some derogable rights may be of equal importance (e.g., due process of law under Article 14 of the Political Covenant). The international community as a whole has neither established a uniform list of nonderogable rights nor ranked nonderogable rights ahead of derogable rights. If a derogable right conflicts with a nonderogable right, the latter will not necessarily prevail, unless, of course, its status as a peremptory norm of general international law is recognized. We shall return to certain additional problems of derogability in our discussion of international public order.

Even a well-established right such as the prohibition of systematic racial discrimination, mentioned in section 702(f) of the draft *Restatement*, presents difficulties when regarded as *jus cogens*. Apartheid, which is mentioned in comment *i* to section 702, is easy to characterize because of its governmental nature and systematic administration, as well as its egregious character. Even apart from apartheid, there is little disagreement with the overall prohibition

<sup>63</sup> Van Boven, *supra* note 14, at 46.

<sup>64</sup> Suy, *supra* note 55, at 938.

of racial discrimination, but the consensus narrows as one moves from the general principle to specific manifestations of discrimination.

These comments are not meant to disparage the ethically important contribution made by the draft *Restatement* to the crystallization, through a proposed list, of the still fluid notion of *jus cogens*. In the long run, such a list may influence the development of the law of *jus cogens*, whose contents will be established through general custom or by universal or quasi-universal agreements.

A recent advisory opinion of the Inter-American Court of Human Rights deals with another important aspect of *jus cogens*: the relationship between derogability and reservations. The Court emphasized that "a reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it."<sup>65</sup> Judge (now President) Buergenthal comments that this opinion

constitutes the first unambiguous international judicial articulation of a principle basic to the application of human rights treaties, that non-derogability and incompatibility are linked. The nexus between non-derogability and incompatibility derives from and adds force to the conceptual interrelationship which exists between certain fundamental human rights and emerging *jus cogens* norms.<sup>66</sup>

While the possibility of conflicts between *jus cogens* norms of human rights and other human rights is largely academic, conflicts may arise between human rights and rules, and especially the implementation of rules, embodied in international agreements governing other matters such as extradition. The *jus cogens* nature of human rights is thus implicated, as the deliberations of the prestigious Institute of International Law (Cambridge, 1983) reveal to interesting effect.

Under the item "New problems of the international legal system of extradition with special reference to multilateral treaties," the rapporteur, Professor Doebling, proposed a draft resolution that provided (Article III(2)): "The invocation of the duty to protect human rights should in any case justify non-extradition, in particular [*sic*—the word "even" would have been preferable] in cases where political persecution does not exist and where thus the granting of asylum cannot be based on that ground."<sup>67</sup> Rather than

<sup>65</sup> Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion No. OC-3/83 of Sept. 8, 1983, Inter-American Court of Human Rights, ser. A: Judgments and Opinions No. 3, para. 61 (1983).

<sup>66</sup> Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AJIL 22, 25 (1985) (footnote omitted). On reservations and *jus cogens*, see generally I. SINCLAIR, *supra* note 41, at 211-12.

<sup>67</sup> 60 Y.B. INST. INT'L L. 214 (1983 II).

In opposing Doebling's proposal, Briggs argued that "the concepts of asylum and human rights were introduced as a sort of unilateral *jus cogens* justifying violation of obligations." *Id.* at 230. McDougal, in supporting the proposal, argued that "for some two hundred years there had been decisions to the effect that the responsibility of the State in respect of the protection of aliens overrode national laws. States could not unilaterally, and *a fortiori* bilaterally, override human rights." *Id.*

merely recommend that states include in extradition agreements provisions stating that if any of their obligations under the agreements conflict with human rights, the latter shall prevail, Professor Doebling's proposal would, in effect, have conferred a hierarchically superior status on human rights *tout court*.

In proposing that the expression "human rights" in the draft resolution be replaced by "basic rights of the human person," Judge Mosler explained that the latter, "though lacking a well-defined content, took account of the dignity of the human person and the needs closely linked with the development of man as a human being." He added that it would not be an exaggeration to state that "the protection that this basic human position justified might prevail over treaties as a norm of *jus cogens*."<sup>68</sup> On the other hand, the expression "human rights" could be interpreted as meaning the United Nations Covenants on Human Rights, at least that on civil and political rights, and even regional conventions. Judge Mosler considered that "obligations to protect human rights as *jus cogens* did not go [so] far. Many of these law-making conventions defined human rights in a precise manner and prevented a wide interpretation of them by making exceptions, for example, for domestic jurisdiction or for measures 'necessary in a democratic society'." Judge Mosler concluded by recommending that the latter type of provision be excluded from Professor Doebling's draft resolution.<sup>69</sup>

Judge Schwebel proposed that the English text of Article III(2) employ the (synonymous) word "fundamental" rather than "basic" to modify human rights,<sup>70</sup> as in the French text (*droits fondamentaux*) of the Judgment in the *Barcelona Traction* case. The text that was eventually adopted by the Institute as Article IV of the resolution reads as follows: "In cases where there is a well-founded fear of the violation of the fundamental human rights of an accused in the territory of the requesting State, extradition may be refused. . . ."<sup>71</sup>

The Institute thus appears to support the proposition that "fundamental human rights" are *jus cogens* and prevail over extradition agreements. We have already discussed the difficulties inherent in defining the content of fundamental human rights. These difficulties are neither resolved nor alleviated by the resolution. If fundamental human rights already constitute *jus cogens*, why does the resolution not employ the term "shall" rather than "may," which would imply a clear duty to accord priority to the norms of *jus cogens*?

To be sure, some human rights that can well be regarded as fundamental have become *jus cogens*. Yet can a whole block of fundamental human rights lacking a well-defined content, as Judge Mosler himself admits, constitute norms that the international community of states as a whole accepts and

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It is of interest to note that Frowein and Kühner single out the danger of torture as justifying nonextradition. Frowein & Kühner, *Drohende Folterung als Asylgrund und Grenze für Auslieferung und Ausweisung*, 43 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 537 (1983).

<sup>68</sup> 60 Y.B. INST. INT'L L., *supra* note 67, at 234.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 259.

<sup>71</sup> *Id.* at 306.

recognizes as permitting no derogations? Nevertheless, the Institute's resolution promotes valuable ethical considerations and may yet contribute to the crystallization of human rights into *jus cogens* and the development of the notion of fundamental human rights.

Another question crucial to international human rights is whether the concept of *jus cogens* applies only to the law of treaties or whether it extends to other fields of international law, including the unilateral action of states. Since violations of human rights almost always result from the unilateral acts of states, rather than from international agreements, the nontreaty aspect of the problem is far more important than the treaty aspect. Even scholars who reserve *jus cogens* to treaty law tend to agree with the elementary proposition that international public order, public order of the international community and international public policy do not allow states to violate severally such norms as they are prohibited from violating jointly with other states.<sup>72</sup>

The International Law Commission appears to have applied the term "peremptory norms" outside the law of treaties to unilateral state action when it adopted the draft articles on state responsibility.<sup>73</sup> Article 33(2)(a) provides that "a state of necessity may not be invoked by a State as a ground for precluding wrongfulness . . . if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law."<sup>74</sup> In this context, however, peremptory norms may refer to categorical rules of international law, or of international public policy, rather than *jus cogens* (which contrasts with the bulk of the rules of international law, the *jus dispositivum*, from which states are permitted, *inter partes*, to contract out), a concept that resides primarily in the law of treaties. Judge Mosler, who deserves credit for coining the phrase "public order of the international community," characterized such order as

consist[ing] of principles and rules the enforcement of which is of such vital importance to the international community as a whole that any unilateral action or any agreement which contravenes these principles can have no legal force. The reason for this follows simply from logic; the law cannot recognise any act either of one member or of several members in concert, as being legally valid if it is directed against the very foundation of law.<sup>75</sup>

Obviously, the rationale underlying the concepts of *jus cogens* and public order of the international community is the same: because of the decisive importance of certain norms and values to the international community, they merit absolute protection and may not be derogated from by states, whether jointly by treaty or severally by unilateral legislative or executive

<sup>72</sup> H. MOSLER, THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY 19-20 (1980). *Contra* Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457, 481 (1985).

<sup>73</sup> [1980] 2 Y.B. INT'L L. COMM'N 30, UN Doc. A/CN.4/SER.A/1980/Add.1 (pt. 2). See also *infra* note 87.

<sup>74</sup> *Id.* at 33. See generally Gaja, *Jus Cogens beyond the Vienna Convention*, 172 RECUEIL DES COURS 271, 296-97 (1981 III).

<sup>75</sup> H. MOSLER, *supra* note 72, at 18.



action. It is in this sense that the International Court of Justice, in *United States Diplomatic and Consular Staff in Tehran*,<sup>76</sup> treated the "imperative character of the legal obligations incumbent upon the Iranian Government."<sup>77</sup>

Elsewhere, we have suggested that even states that are not parties to the Political Covenant may not derogate from categorical or absolute human rights, and that derogations cannot be clearly excessive or arbitrary, or in conflict with other international obligations of the state concerned.<sup>78</sup> Comment *h* to section 711 of the draft *Restatement* contains the intriguing proposition that the derogations permissible during an emergency under the Political Covenant are presumably also permissible under customary law in relation to nationals of other states.<sup>79</sup> Perhaps there is, indeed, some overlap in international law between derogations permitted by Article 4 of the Political Covenant and the customary rules of exception to the law governing state responsibility, such as those based on force majeure, state of necessity or self-defense (draft Articles 31, 33 and 34 of the draft articles on state responsibility). It is not certain, however, that the match of these customary rules with derogations permissible under Article 4 is perfect, or that the scope of the derogations allowed is identical.

If human right *X* is binding on a state not party to the Political Covenant in relation to its nationals or aliens, the derogating state would have to discharge the burden of establishing justifications such as state of necessity, just as if it had breached any other international legal obligation. Where a state cannot successfully discharge such a burden, the principle applies, as pointed out by Professor Marek (who cites Professor Verdross),<sup>80</sup> that a single state is not permitted to derogate from any rule of international law, peremptory or not. The significance of the *jus dispositivum* character of most rules of international law lies in the fact that a group of states, strictly in their mutual relations, may substitute a rule of conventional law for a rule of customary law. The difference between peremptory and other rules of international law is that, in the case of the former, the prohibition of derogations is absolute.

If the rationale underlying the concepts of *jus cogens* and public order of the international community is the same, are the legal consequences of violation also the same? An affirmative answer is suggested by Judge Mosler, who insists that an agreement or unilateral action that conflicts with the public policy of the international community can have no legal force and presumably is void *ipso jure*.

This thesis requires scrutiny. Of course, a conflict between an international agreement and a rule of *jus cogens* nullifies the former. Judge Mosler would find a unilateral act similarly void. A treaty, however, is a creature of international law, while a unilateral state act may be rooted in the national legal system. Depending on the relationship between international law and internal law in the state concerned, it cannot be taken for granted that the unilateral

<sup>76</sup> 1980 ICJ REP. 3, *supra* note 6.

<sup>77</sup> *Id.* at 41.

<sup>78</sup> Meron, *supra* note 54, at 601-02 & n.69. <sup>79</sup> DRAFT RESTATEMENT, *supra* note 11.

<sup>80</sup> Marek, *Sur la Notion de Progrès en Droit International*, 38 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 28, 35 (1982).

act would have no internal legal force. Indeed, the possibility of nullity is not even mentioned in Article 33 of the ILC's draft articles on state of necessity. The violating state would incur international responsibility (or perhaps even international criminal responsibility if the principle stated in Article 19(3) of the ILC's draft articles were applied), but the unilateral act itself would probably not be void, at least as regards its consequences under internal law. Professor Marek properly warns against "l'oblitération de la différence entre acte illicite et acte nul."<sup>81</sup>

The appropriate remedy for such a violation of a peremptory norm may therefore be annulment of the unilateral act, rather than nullity *ipso jure*. Third states would have the right and the duty to question the illegal act, and to refrain from recognizing it or giving it legal effect. On the international legal plane, the principle *ex injuria jus non oritur* would thus be followed. Judge Mosler's statement that the unilateral act would have no legal force may have been intended to suggest that the act would not be recognized by third states as valid under international law. It is in this sense that Professor Jaenicke perceives the ramifications of international public order.<sup>82</sup>

These observations may become clearer if viewed against a specific case. The United Nations Report on Protection of Human Rights in Chile (the Ermacora report) discussed a Chilean amnesty decree-law, which had been applied to protect governmental agents responsible for the deaths of detainees.<sup>83</sup> The report argued that Chile was responsible under Articles 29 and 146 of the Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV) of August 12, 1949.<sup>84</sup> It is not our present object to discuss whether this position was correct in law. Suffice it to observe that rather than insist on the nullity of the decree-law, the report recommended that the "amnesty decree-law should not be applied in such a way as to run counter to Chile's international responsibilities, especially in regard to the Geneva Convention."<sup>85</sup>

## V. CONCLUSION

The use of hierarchical terms in discussing human rights reflects the quest for a normative order in which higher rights could be invoked as both a moral and a legal barrier to derogations from and violations of human rights. Their introduction into international law was inspired by the national law analogy with its firmly established hierarchical structure. The trend towards the characterization of certain rights as hierarchically superior may also be seen as a response to the proliferation of human rights instruments, sometimes of poor quality and uncertain legal value. When some rights proclaimed

<sup>81</sup> *Id.*

<sup>82</sup> Jaenicke, *International Public Order*, in *ENCYCLOPEDIA*, *supra* note 57, at 314, 317.

<sup>83</sup> UN Doc. A/34/583/Add.1, at 96 (1979).

<sup>84</sup> *Id.* For the text of Geneva Convention No. IV, see 6 UST 3516, TIAS No. 3365, 75 UNTS 287.

<sup>85</sup> UN Doc. A/34/583/Add.1, *supra* note 83, at 98.

P 3793.

by such instruments are questioned, it is not surprising that attempts are made to upgrade other rights by giving them various quality labels, on the assumption that the authority of the higher right will not be impugned.

One cannot deny that the quality labels are a useful indication of the importance attached to particular rights. They strengthen the case against violation of such rights. Hierarchical terms constitute a warning sign that the international community will not accept any breach of those rights. Historically, the notions of "basic rights of the human person" and "fundamental rights" have helped establish the *erga omnes* principle, which is so crucial to ensuring respect for human rights. Eventually, they may contribute to the crystallization of some rights, through custom or treaties, into hierarchically superior norms, as in the more developed national legal systems.

Yet the balance of pros and cons does not necessarily weigh clearly on the side of the pros. Resort to hierarchical terms has not been matched by careful consideration of their legal significance. Few criteria for distinguishing between ordinary rights and higher rights have been agreed upon. There is no accepted system by which higher rights can be identified and their content determined. Nor are the consequences of the distinction between higher and ordinary rights clear. Rights not accorded quality labels, i.e., the majority of human rights, are relegated to inferior, second-class, status. Moreover, rather than grapple with the harder questions of rationalizing human rights lawmaking<sup>86</sup> and distinguishing between rights and claims, some commentators are resorting increasingly to superior rights in the hope that no state will dare—politically, morally and perhaps even legally—to ignore them. In these ways, hierarchical terms contribute to the unnecessary mystification of human rights, rather than to their greater clarity.

Caution should therefore be exercised in resorting to a hierarchical terminology. Too liberal an invocation of superior rights such as "fundamental rights" and "basic rights," as well as *jus cogens*, may adversely affect the credibility of human rights as a legal discipline.

Removal of the underbrush that clutters the landscape of concepts and nomenclature may make it possible to build a sounder, less amorphous structure of human rights, which should be based on an enlarged core of non-derogable rights. To these ends, the international community should direct its efforts to defining the distinction between ordinary and higher rights and the legal significance of this distinction, steps that would contribute significantly to resolving conflicts between rights. It should also intensify the effort to extend the list of nonderogable rights recognized by the international community of states as a whole. In addition, the ethically important concepts of *jus cogens* and public order of the international community should be allowed to develop gradually through international practice and growing consensus. General acceptance of these concepts would go far towards deterring violations. Finally, the new human rights structure should eventually be secured by international acceptance of binding provisions for the adju-

<sup>86</sup> See generally Alston, *supra* note 12; Meron, *Reform of Lawmaking in the United Nations: The Human Rights Instance*, 79 AJIL 664 (1985).

dication of disputes implicating *jus cogens* and public order of the international community.<sup>87</sup>

One day, perhaps, the international community will be able to agree on at least some of these measures. That day, however, is not yet in sight.

<sup>87</sup> The ILC's commentary to draft Article 12(b) on state responsibility (part 2) mentions the reluctance of some members to apply the concept of *jus cogens* outside of the framework of the Vienna Convention on the Law of Treaties. Other members, however, supported the retention of that article. The view was expressed that "a provision relating to *jus cogens* required . . . a procedural provision along the lines of that provided for in the Vienna Convention." Report of the International Law Commission on the work of its thirty-seventh session, *supra* note 51, at 48.

## COURT-ORDERED PROVISIONAL MEASURES UNDER THE NEW YORK CONVENTION

*By Charles N. Brower and W. Michael Tupman\**

### INTRODUCTION

In recent years, several courts in the United States have denied requests for pre-award attachments on the ground that such remedies were contrary to the parties' agreement to arbitrate, and thus to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention or Convention).<sup>1</sup> Despite these decisions, pre-award attachment is an available remedy in certain jurisdictions in the United States. Furthermore, pre-award remedies to secure assets located outside the United States can be obtained through the courts in other countries.

The availability of pre-award attachment is of strategic importance. Although the rules of most international arbitral regimes authorize a tribunal to order interim or provisional measures,<sup>2</sup> a tribunal has no executory authority to enforce the order against the assets of one of the parties. Moreover, it often takes several months to register a request for arbitration, appoint arbitrators and constitute the tribunal.<sup>3</sup> Additional time may elapse before

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<sup>1</sup> Done at New York, June 10, 1958, 21 UST 2517, TIAS No. 6997, 330 UNTS 3. The purpose of the New York Convention is "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). In addition to the United States, as of Jan. 1, 1985, there were 67 parties to the New York Convention. Two of them, however, are constituent subdivisions of one of the parties, the USSR. See U.S. DEP'T OF STATE, TREATIES IN FORCE 208 (1985). For a comprehensive overview of the Convention and the case law it has spawned, see generally A. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958* (1981).

<sup>2</sup> See, e.g., Art. 26 of the Arbitration Rules of the United Nations Commission on International Trade Law, UN Doc. A/31/17 (1976) (UNCITRAL Rules); Rule 39 of the Rules of Procedure for Arbitration Proceedings of the International Centre for Settlement of Investment Disputes, Doc. ICSID/15 (1985) (ICSID Rules); Art. 34 of the Commercial Arbitration Rules of the American Arbitration Association (1984) (AAA Rules). The RULES OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE, ICC PUB. NO. 291 (reprinted 1981) (ICC Rules), make no such express provision, but an ICC tribunal has inherent authority to order provisional measures. Cf. Art. 8(5), ICC Rules.

<sup>3</sup> Under the UNCITRAL Rules, the tribunal should be constituted within 90 days (if a sole arbitrator) or 120 days (if three arbitrators), assuming the parties have designated an appointing authority that acts within the time limits under the rules. See UNCITRAL Rules, *supra* note 2,

the tribunal meets to consider a request for provisional measures. The other party to the contract may claim the arbitration agreement is invalid, or does not cover the particular dispute; the tribunal then must consider, at least to some extent, the question of its own competence in deciding on the request for provisional measures.

During these months, the other party can take steps to conceal or dissipate assets, for example, by transferring them to affiliated companies that are not parties to the arbitration agreement. When it comes time to enforce an arbitral award, there may be little or nothing against which to execute. A court attachment at the outset can obviate this problem.

This article surveys the law regarding court-ordered provisional measures in the United States, England and France.<sup>4</sup> In contrast to previous works on the subject,<sup>5</sup> it not only criticizes the decisions of some U.S. courts denying pre-award attachments, but also demonstrates by comparison to the law in other states that those decisions frustrate the essential purpose of the New York Convention: to promote the recognition and enforcement of arbitral awards, and to do so on a uniform basis throughout the world. It is hoped that American courts will thereby be encouraged universally to accept that pre-award attachments are compatible with the New York Convention.

## I. THE DIVIDED COURTS IN THE UNITED STATES

The U.S. Arbitration Act (the Act) consists of two chapters. Chapter 2 is the implementing legislation for the New York Convention,<sup>6</sup> which entered into force for the United States on December 29, 1970. Chapter 2 republishes the text of the Convention<sup>7</sup> and provides that an arbitration agreement falls under the Convention if it arises "out of a legal relationship, whether contractual or not, which is considered as commercial," unless the relationship "is entirely between citizens of the United States."<sup>8</sup> An agreement involving only U.S. citizens also falls under the Convention if there is some "reasonable

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Arts. 6 and 7. Under ICSID a tribunal should be constituted within 120 days. See ICSID Rules, *supra* note 2, Rules 1-4. In the first 11 ICSID arbitrations registered, however, the average time for constituting a tribunal was 8-9 months. See ICSID, FIFTEENTH ANNUAL REPORT (1980-81). Unlike the UNCITRAL and ICSID Rules, the ICC Rules do not impose time limits on most of the steps in constituting a tribunal, but, according to the ICC Secretariat, barring exceptional circumstances, a tribunal is usually constituted within 3 months.

<sup>4</sup> It is assumed throughout this article that the parties have not dealt with the issue of attachment in their arbitration agreement. The parties might agree, for example, that they will not have to post security in the event of a dispute.

<sup>5</sup> See Becker, *Attachments in Aid of International Arbitration—the American Position*, 1 ARB. INT'L 40 (1985); Note, *An Argument for Pre-Award Attachment in International Arbitration under the New York Convention*, 18 CORNELL INT'L L.J. 99 (1985); Note, *Pre-Award Attachment under the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 21 VA. J. INT'L L. 785 (1981).

<sup>6</sup> Pub. L. No. 91-368, §1, July 31, 1970, 84 Stat. 692 (codified at 9 U.S.C. §§201-208 (Supp. 1985)).

<sup>7</sup> 9 U.S.C. §201 (Supp. 1985).

<sup>8</sup> 9 U.S.C. §202 (Supp. 1985). For purposes of §202, "a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States." *Id.*

relation with one or more foreign states," for example, if the commercial relationship "involves property located abroad, [or] envisages performance or enforcement abroad."<sup>9</sup> All other arbitration agreements are governed by chapter 1.<sup>10</sup>

The legal relationship between chapters 1 and 2 of the Act has been of fundamental concern to U.S. courts in considering the propriety of pre-award attachment under the New York Convention. It therefore is necessary first to consider the case law on chapter 1.

### *Pre-Award Attachment under Chapter 1*

Chapter 1 affords three kinds of prearbitration remedies. Section 3 provides that a party to a federal court proceeding may apply to "stay the trial of the action" until the conclusion of an arbitration.<sup>11</sup> If a party refuses to arbitrate, under section 4 the aggrieved party may petition "for an order directing that such arbitration proceed in the manner provided for in [the arbitration] agreement."<sup>12</sup>

Section 8 provides that where a federal court is seized of "a cause of action otherwise justiciable in admiralty," a party may commence a proceeding "by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings."<sup>13</sup> "[T]he court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."<sup>14</sup> On the basis of this express authority, the federal courts have consistently granted attachments in maritime cases under section 8 even though the dispute was to be arbitrated.<sup>15</sup>

The federal courts also have granted pre-award attachments in commercial actions where a defendant in a plenary action seeks a stay of the proceeding and an order pursuant to section 3 of the Act directing the parties to arbitration. In *Murray Oil Products Co. v. Mitsui & Co., Ltd.*,<sup>16</sup> the U.S. Court of Appeals for the Second Circuit held that "an arbitration clause does not deprive a promisee of the usual provisional remedies, even when he agrees that the dispute is arbitrable."<sup>17</sup> Although the Act makes express provision for pre-award attachment only in maritime cases, the Second Circuit con-

<sup>9</sup> *Id.*

<sup>10</sup> The U.S. Congress enacted chapter 1 on July 30, 1947, §1, 61 Stat. 699 (codified at 9 U.S.C. §§1-14 (1984)). Chapter 1 applies to written arbitration agreements "in any maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C. §2 (1984).

<sup>11</sup> 9 U.S.C. §3 (1984).

<sup>12</sup> 9 U.S.C. §4 (1984).

<sup>13</sup> 9 U.S.C. §8 (1984).

<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., *Reefer Express Lines Pty. v. Petmovar, S.A.*, 420 F.Supp. 16 (S.D.N.Y. 1976); *Texas San Juan Oil Corp. v. An-Son Offshore Drilling Co.*, 194 F.Supp. 396 (S.D.N.Y. 1961); *Instituto Cubano de Estabilizacion del Azucar v. T/V Firbranch*, 130 F.Supp. 170 (S.D.N.Y. 1954); *The Belize*, 25 F.Supp. 663 (S.D.N.Y. 1938); and cases discussed in the text at notes 29-34 *infra*.

<sup>16</sup> 146 F.2d 381 (2d Cir. 1944) (Hand, J.). *Accord* *Coastal States Trading, Inc. v. Zenith Navigation S.A.*, 446 F.Supp. 330 (S.D.N.Y. 1977).

<sup>17</sup> 146 F.2d at 384.

cluded: "We cannot conceive of any reason for giving the remedy of attachment . . . to [maritime cases] and denying it to [commercial cases]." <sup>18</sup>

The Second Circuit based its decision in part on dicta in a U.S. Supreme Court decision. <sup>19</sup> More fundamentally, the court recognized that to grant provisional remedies would not conflict with, but rather would promote, the strong federal policy in favor of arbitration and enforcement of arbitral awards. Attachment "is entirely consistent with a desire to make as effective as possible recovery upon awards, after they have been made, which is what provisional remedies do." <sup>20</sup>

In section 4 proceedings to compel arbitration, the remedy of pre-award attachment may be unavailable, at least in the federal courts of New York. In *Greenwich Marine, Inc. v. S.S. Alexandra*, <sup>21</sup> the only case in which the issue has been considered, the Second Circuit distinguished section 8 of the Act, which expressly provides for both seizing a vessel and directing the parties to arbitration, from section 4, which provides only for compelling arbitration.

The purpose of section 8 is to relieve a party from making an election between the libel-cum-seizure remedy, on the one hand, and the order-to-arbitrate remedy, on the other hand—not to append the right to seizure to the order-to-arbitrate remedy of section 4. <sup>22</sup>

Although in *Greenwich Marine* the Second Circuit did not discuss its earlier decision in *Murray Oil*, it appears that the distinction between section 3 and section 4 proceedings is based on whether the court retains jurisdiction over the case. Under section 3, the court stays the action until the arbitration is completed. Under section 4, in contrast, the court issues an order compelling the parties to arbitrate. There is no express statutory provision for a stay of judicial proceedings and hence, implicitly, the court divests itself of jurisdiction.

#### *Pre-Award Attachment under Chapter 2*

While it is clear that pre-award attachment is available under chapter 1 of the Act, after the New York Convention entered into force in the United States, the question arose whether such a remedy was also available under chapter 2. The first court to consider this issue was the U.S. Court of Appeals for the Third Circuit in *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, <sup>23</sup> a diversity case involving an attachment under Pennsylvania state law. In *McCreary* the defendant appealed orders of the district court denying its motions to vacate an attachment and to stay the court proceedings pending

<sup>18</sup> *Id.*

<sup>19</sup> *The Anaconda v. American Sugar Ref. Co.*, 322 U.S. 42 (1944). In *The Anaconda* the Supreme Court stated that a stay and referral to arbitration "does not oust the court's jurisdiction of the action, though the parties have agreed to arbitrate. And, it would seem there is nothing to prevent the plaintiff from commencing the action by attachment if such procedure is available under the applicable law." *Id.* at 44-45.

<sup>20</sup> 146 F.2d at 384.

<sup>21</sup> 339 F.2d 901 (2d Cir. 1965). This is the only reported U.S. case to have considered the issue.

<sup>22</sup> *Id.* at 904.

<sup>23</sup> 501 F.2d 1032 (3d Cir. 1974).



arbitration. The Third Circuit reversed both orders, and flatly held that the Convention precluded a U.S. court from granting provisional remedies to a party to a valid arbitration agreement. The court reasoned that by invoking the judicial process of attachment, a party "seeks to bypass the agreed upon method of settling disputes [i.e., arbitration]. Such a bypass is prohibited by the Convention if one party to the agreement objects."<sup>24</sup>

The Third Circuit distinguished proceedings under chapter 1 of the Act, where a court has express authority to retain jurisdiction when referring the parties to arbitration, from proceedings under chapter 2, where there is no comparable authority.<sup>25</sup> Moreover, section 205 of the Act, providing for removal to the federal courts of actions falling under the Convention, implied congressional intent "to prevent the vagaries of state law from impeding full implementation [of the Convention]. Permitting a continued resort to foreign attachment in breach of the agreement is inconsistent with that purpose."<sup>26</sup>

Subsequently, the U.S. District Court for the Southern District of New York in *Metropolitan World Tanker Corp. v. P.N. Pertamina Minjakdangas Bumi Nasional*,<sup>27</sup> though not bound by *McCreary*, nevertheless adopted the Third Circuit's rationale. "[T]o allow a resort to attachment before [arbitral] proceedings would seem to put an unnecessary and counterproductive pressure on a situation which could otherwise be settled expeditiously and knowledgeably in an arbitration context."<sup>28</sup> Since *Metropolitan World Tanker*, however, federal courts have chipped away at *McCreary* and in two cases rejected the decision outright.

A line of cases in the federal courts in New York has created a "maritime exception" to *McCreary*. In *Andros Compania Maritima v. Andre & Cie.*,<sup>29</sup> the court upheld the arrest of a vessel even though the parties had agreed to arbitrate their dispute. The court focused on section 208 of the Act, which provides that chapter 1 applies to arbitration agreements falling under the New York Convention "to the extent that [chapter 1] is not in conflict with . . . the Convention."<sup>30</sup> The court concluded: "[We] cannot agree that the prearbitration attachment allowed by Section 8 would disserve the Convention's purposes by discouraging resort to arbitration or by obstructing the course of arbitral proceedings."<sup>31</sup> Indeed, as the Second Circuit noted in *Murray Oil*, pre-award attachment enhanced the arbitral procedure by making recovery on an arbitral award more effective.<sup>32</sup> As for the other rationale

<sup>24</sup> *Id.* at 1038.

<sup>25</sup> Section 8 provides that a court "shall retain jurisdiction to enter its decree upon the award"; under §3, a court retains jurisdiction by means of the stay procedure. Article II(3) of the New York Convention provides that a court "shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative, or incapable of being performed." 9 U.S.C. §201 (Supp. 1985).

<sup>26</sup> 501 F.2d at 1038.

<sup>28</sup> *Id.* at 4.

<sup>30</sup> 9 U.S.C. §208 (Supp. 1985).

<sup>32</sup> *Id.* at 92-93.

<sup>27</sup> 427 F.Supp. 2 (S.D.N.Y. 1975).

<sup>29</sup> 430 F.Supp. 88 (S.D.N.Y. 1977).

<sup>31</sup> 430 F.Supp. at 92.

of *McCreary*—that Congress intended to prevent the vagaries of state law from impeding full implementation of the Convention—the court in *Andros* distinguished its case as involving federal, rather than state, attachment law.<sup>33</sup>

The decision in *Andros* has been followed in three other federal cases in New York.<sup>34</sup> The courts did not expressly repudiate *McCreary* but rather, as *Andros* did in part, chose to distinguish it as based upon state attachment law.<sup>35</sup> A California federal district court in *Carolina Power & Light Co. v. Uranex*<sup>36</sup> went further and rejected *McCreary* outright.

The court in *Carolina Power* noted that the New York Convention and its implementing statute “contain no reference to prejudgment attachment, and provide little guidance in this controversy.”<sup>37</sup> Like the New York federal district courts in the “maritime exception” cases, the court in *Carolina Power* focused on section 208 of the Act and concluded that pre-award attachment, to the extent available under chapter 1 of the Act, would not conflict with “the text or the apparent policies of the Convention.”<sup>38</sup> Indeed, the court observed that “the availability of provisional remedies encourages rather than obstructs the use of agreements to arbitrate.”<sup>39</sup> The court therefore decided to treat agreements to arbitrate falling under the Convention in the same way the U.S. courts had treated agreements to arbitrate under chapter 1. Chapter 1, “which operates much like the Convention for domestic agreements involving maritime or interstate commerce, does not prohibit maintenance of a prejudgment attachment during a stay pending arbitration.”<sup>40</sup> Similarly, chapter 2 does not prohibit such attachments.

The *Carolina Power* decision was fully endorsed by a New York federal district court in *Compania de Navegacion y Financiera Bosnia v. National Unity Marine Salvage Corp.*<sup>41</sup> Since then, however, there has been a shift back to

<sup>33</sup> *Id.* at 91–92. The attachment in *Andros* was based upon Rule B(1) of the Supplemental Rules of Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure.

<sup>34</sup> *Construction Exporting Enters., UNECA v. Nikki Maritime Ltd.*, 558 F.Supp. 1372 (S.D.N.Y.), *dismissed mem.*, 742 F.2d 1432 (2d Cir. 1983); *Paramount Carriers Corp. v. Cook Indus.*, 465 F.Supp. 599 (S.D.N.Y. 1979); *Atlas Chartering Servs. v. World Trade Group*, 453 F.Supp. 861 (S.D.N.Y. 1978).

<sup>35</sup> Implicitly, though, all four federal district courts in New York repudiated *McCreary* in determining that a maritime pre-award attachment did not conflict with the purposes of the Convention.

<sup>36</sup> 451 F.Supp. 1044 (N.D. Cal. 1977).

<sup>37</sup> *Id.* at 1050.

<sup>38</sup> *Id.* at 1052. Although *Carolina Power* was a commercial and not a maritime case, there is no logical reason to distinguish the two kinds of cases with respect to pre-award attachment. See *Murray Oil*, 146 F.2d at 384. If a §8 attachment does not conflict with the purposes of the Convention, similarly a §3 attachment also would not conflict.

<sup>39</sup> 451 F.Supp. at 1052 (citing *Boys Mkts., Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970)). In that case, the Supreme Court held that the Norris-LaGuardia Act did not preclude a court, in referring parties to arbitration, from enjoining the defendant union from “strikes, lockouts, or other self-help measures. . . . [T]he unavailability of equitable relief in the arbitration context presents a serious impediment to the congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes. . . .” 398 U.S. at 249, 253.

<sup>40</sup> 451 F.Supp. at 1051.

<sup>41</sup> 457 F.Supp. 1013 (S.D.N.Y. 1978). Although the court held it had the “power to order

*McCreary* in two important cases.<sup>42</sup> In *I.T.A.D. Associates v. Podar Brothers*,<sup>43</sup> the U.S. Court of Appeals for the Fourth Circuit, with little discussion, vacated a pre-award attachment as contrary "to the parties' agreement to arbitrate and the Convention."<sup>44</sup> In *Cooper v. Ateliers de la Motobecane, S.A.*, the New York Court of Appeals, in a sharply divided four to three decision, also vacated an attachment on similar grounds.<sup>45</sup>

The majority of the Court of Appeals focused on Article VI of the New York Convention, noting that if enforcement of an arbitral award is opposed, "the proponent of the award may request that the other party be ordered to give suitable security."<sup>46</sup> Because there was no such express provision for pre-award security, the majority concluded that the Convention did "not contemplate significant judicial intervention until *after* an arbitral award is made," except to determine whether arbitration should be compelled.<sup>47</sup> The majority also justified its decision as consistent with one of the purposes of the Convention: to standardize the procedures for enforcing arbitral awards so as to avoid subjecting parties "to foreign laws with which [they are] unfamiliar."<sup>48</sup>

Moreover, the majority observed that "[i]t is open to dispute whether attachment is even necessary in the arbitration context."<sup>49</sup> Parties were "free to include security clauses (e.g., performance bonds or creating escrow accounts) in their agreements to arbitrate."<sup>50</sup> Even without such a clause, the "good faith" character of arbitration usually resulted in voluntary compliance with arbitral awards.<sup>51</sup> Nevertheless, if the losing party refused to comply, "the list of signatory countries provides assurance to a contracting party that it will be able to enforce an arbitral award almost anywhere in the world."<sup>52</sup>

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provisional relief pending a foreign arbitration," it stated it would not exercise that power if the attachment "seeks to engage the Court in the merits of the dispute, and further delays the resolution of the merits in the chosen arbitral forum." *Id.* at 1014, 1015.

<sup>42</sup> See also *Cordoba Shipping Co. v. Maro Shipping Ltd.*, 494 F.Supp. 183, 188 (D. Conn. 1980) (dicta that pre-award attachment under the Convention "is inappropriate since arbitration under the Convention (rather than the [U.S. Arbitration] Act) divests the court of jurisdiction").

<sup>43</sup> 636 F.2d 75 (4th Cir. 1981).

<sup>44</sup> *Id.* at 77. The Fourth Circuit's decision relied exclusively on the analysis in *McCreary*, and therefore is not discussed in more detail in this article.

<sup>45</sup> 57 N.Y.2d 408, 456 N.Y.S.2d 728 (1982). New York is the only state in the United States whose courts have considered pre-award attachment under the Convention. The U.S. case law regarding this issue is almost exclusively federal because the federal courts have subject matter jurisdiction over any "action or proceeding falling under the Convention . . . regardless of the amount in controversy" and because the Act provides for removal of such actions from the state to the federal courts. 9 U.S.C. §§203, 205 (Supp. 1985).

<sup>46</sup> 57 N.Y.2d at 414, 456 N.Y.S.2d at 730. See New York Convention, *supra* note 1, Art. VI (a court that has been petitioned to recognize and enforce a foreign arbitral award falling under the Convention "may . . . on the application of the party claiming enforcement of the award, order the other party to give suitable security").

<sup>47</sup> 57 N.Y.2d at 416, 456 N.Y.S.2d at 732.

<sup>48</sup> 57 N.Y.2d at 414, 456 N.Y.S.2d at 731.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

The majority of the Court of Appeals considered its decision to be consistent with the "maritime exception" cases in the federal courts in New York. Section 208 of the U.S. Arbitration Act provides that "normal arbitration law applies to the extent it is not inconsistent with the [New York] Convention. That law specifically provides attachment to be used in admiralty cases."<sup>53</sup> *Cooper*, in contrast, involved a commercial, not a maritime contract. As for the *Carolina Power* case, which also involved a commercial contract, the federal court in California was "concerned that the plaintiff would be unable to enforce an eventual arbitral award," a rationale the majority in *Cooper* did not find compelling.<sup>54</sup>

The three dissenting judges in *Cooper* criticized the majority's construction of the interrelationship between chapters 1 and 2 of the U.S. Arbitration Act as illogical. The majority conceded "that foreign arbitration awards are enforced on the same terms as domestic awards" and "that there are circumstances under which a domestic award may be enforced under our law through use of a preaward attachment."<sup>55</sup> The dissenting judges observed, however, that attachment in maritime contract cases under federal law "cannot properly be distinguished from arbitration-related attachment permitted under State statutory and decisional law, for the [New York] Convention makes no distinction; it either permits or proscribes both."<sup>56</sup>

#### *Criticism of Denial of Pre-Award Attachment*

The authors submit that *McCreary* and its progeny were decided incorrectly. While admitting that neither the New York Convention nor the U.S. implementing legislation is addressed to the issue of pre-award attachment, the Third Circuit in *McCreary* strained to imply congressional intent "to prevent the vagaries of state law" from impeding the purposes of the Convention. One basis for the implication was a provision in chapter 2 for removal to the federal courts. This rationale, of course, does not preclude attachments based on federal law, an opening quickly seized upon by the federal courts in New York in admiralty. Moreover, as the dissent in *Cooper* observed, the rationale is illogical, because federal and state law attachments are equal in their effect and hence cannot validly be distinguished.<sup>57</sup>

The Third Circuit in *McCreary* also implied congressional intent from the absence of express language in chapter 2 regarding a stay of court proceedings and the retention of jurisdiction by a court, in contrast to sections 3 and 8 of chapter 1. Article II(3) of the New York Convention provides that a court shall "refer the parties to arbitration" if the subject matter of a court action is covered by a valid arbitration agreement. The Third Circuit construed the term "refer" to mean it had to divest itself completely of jurisdiction in ordering the parties to arbitration.<sup>58</sup> No such inference, however,

<sup>53</sup> 57 N.Y.2d at 415, 456 N.Y.S.2d at 731.

<sup>54</sup> 57 N.Y.2d at 416, 456 N.Y.S.2d at 731-32.

<sup>55</sup> 57 N.Y.2d at 416 (citing majority opinion, *id.* at 413), 456 N.Y.S.2d at 732.

<sup>56</sup> 57 N.Y.2d at 416-17, 456 N.Y.S.2d at 732.

<sup>57</sup> 57 N.Y.2d at 417, 456 N.Y.S.2d at 732. <sup>58</sup> 501 F.2d at 1038.

"can be drawn from the use of the word refer rather than stay the court action. The word refer is used [in the New York Convention] for historical reasons and its technical procedural sense must be deemed as a court directive staying the court proceedings on the merits."<sup>59</sup> This interpretation is confirmed by the implementing acts of other states parties to the Convention, such as the United Kingdom, which provide for a stay of court proceedings.<sup>60</sup>

The expression "refer the parties to arbitration" means that a court lacks jurisdiction only "to try the merits of the dispute when the arbitration agreement is involved."<sup>61</sup> The court therefore has jurisdiction

to appoint or replace arbitrators if the parties have not made arrangements in this respect in their agreement, to administer evidence beyond the powers of the arbitrator, to decide on the setting aside of an award, . . . [and to order] provisional remedies, especially attachment for securing the sum or goods in dispute.<sup>62</sup>

The legal reasoning of the majority decision in *Cooper* is equally flawed. Although the New York Convention provides expressly for the posting of security after an arbitral award is rendered, it is completely silent on "the subject of preaward attachment," as was noted by the dissenting judges.<sup>63</sup> They found nothing in the U.S. implementing legislation that evidenced congressional intent "to foreclose the use of attachment where permitted by the law of the jurisdiction in which attachment is obtained."<sup>64</sup> If the drafters of the Convention or the U.S. Congress had intended to make a sweeping change in the availability of pre-award attachment, surely this intent would have been express and should not simply be implied, as the majority in *Cooper* did.<sup>65</sup>

The policy considerations motivating the majority in *Cooper* are also unconvincing. By denying pre-award attachment in the United States, the majority sought to prevent exposing "American property overseas to whatever rules of attachment may apply in some country when our citizen has agreed to arbitrate a dispute."<sup>66</sup> Yet, as the remaining parts of this article will demonstrate, the courts in other states parties to the New York Convention have the power and will issue orders to secure property of U.S. nationals that are parties to a valid arbitration agreement. Although parties theoretically can make provision in their arbitration agreement for pre-award security, as a practical matter they frequently are able to agree only on a choice of arbitral regime, and perhaps a situs of arbitration and choice of law. To depend merely on the "good faith" of an opposing party to comply voluntarily with an award may entail a considerable financial risk.<sup>67</sup> Finally, the New York

<sup>59</sup> Van den Berg, *Commentary Volume IX*, 9 Y.B. COM. ARB. 365 (1984).

<sup>60</sup> See discussion in the text at note 81 *infra*. <sup>61</sup> A. VAN DEN BERG, *supra* note 1, at 131.

<sup>62</sup> *Id.*

<sup>63</sup> 57 N.Y.2d at 416, 456 N.Y.S.2d at 732.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> 57 N.Y.2d at 415, 456 N.Y.S.2d at 732.

<sup>67</sup> The *Cooper* majority cited one article estimating that losing parties voluntarily comply with "as high as 85%" of arbitral awards. 57 N.Y.2d at 414, 456 N.Y.S.2d at 731. Aside from the dubious precision of this "estimate," a party should not have to run any risk concerning voluntary compliance.

Convention does not guarantee that an award can be enforced "almost anywhere in the world."<sup>68</sup> As of January 1, 1985, only 68 states were parties to the Convention; most have made declarations limiting its effect.<sup>69</sup> Even where it is applicable, enforcement is not automatic, as the losing party very often challenges enforcement on one or more of the seven grounds set forth in Article V of the Convention.<sup>70</sup>

The underlying rationale of both *McCreary* and *Cooper* rests upon misapprehension of the principle that the "essence of arbitration is resolving disputes without the interference of the judicial process and its structures."<sup>71</sup> It is true, of course, that judicial interference in the arbitral process itself would defeat the advantages of "speed, low expense, and flexibility" that arbitration may enjoy over litigation.<sup>72</sup> Pre-award attachment, however, unlike other kinds of judicial involvement in the arbitral process (such as interlocutory appeals), does not delay an adjudication on the merits. Moreover, whereas speed and lower expense are particularly important concerns with respect to domestic arbitrations, in the international context, "the purpose of arbitration is not so much 'to obtain an award rapidly . . . ' but rather to have arbitrators resolve a dispute which for political and legal reasons is difficult to submit to the courts."<sup>73</sup>

The New York Convention necessarily contemplates a combination of both judicial and arbitral proceedings to resolve international disputes. The courts are integrally involved, first, by referring the parties to arbitration, and later, in enforcing the arbitral award.<sup>74</sup> Judicial and arbitral proceedings go hand in hand, complementing one another. The arbitral tribunal determines the merits of the case. The courts, backed by the power of the state,

<sup>68</sup> *Id.*

<sup>69</sup> TREATIES IN FORCE, *supra* note 1, at 208. For example, most states have declared that the Convention will apply only to awards made in the territory of another state party, and only to awards arising out of legal relationships that are considered to be commercial under the national law of such state.

<sup>70</sup> Article V provides that a municipal court in a state party to the Convention may refuse to recognize and enforce a foreign arbitral award if the opposing party furnishes proof that: (1) the arbitration agreement was invalid; (2) the opposing party was not given proper notice of the arbitration proceedings or was otherwise unable to present its case; (3) the arbitral tribunal exceeded its powers; (4) the tribunal was improperly constituted; or (5) the award has not yet become binding on the parties or has been set aside. Recognition and enforcement may also be refused if the court finds that: (6) the subject matter of the dispute is not capable of settlement by arbitration under the law of that country; or (7) recognition or enforcement of the award would be contrary to the public policy of that forum. For a case discussing many of these grounds, see *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974).

<sup>71</sup> 57 N.Y.2d at 416, 456 N.Y.S.2d at 729. <sup>72</sup> *Id.*

<sup>73</sup> *Société Chérifienne des Pétroles v. Entreprise Nationale Sonatrach*, Judgment of June 3, 1983, Cour de justice civile de Genève, 1983 La Semaine judiciaire 501, 505.

<sup>74</sup> Furthermore, the municipal law in many states requires judicial oversight of the arbitral proceedings. See generally Delaume, *Court Intervention in Arbitral Proceedings*, in *RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION* 235 (T. Carbonneau ed. 1984). Thus, for example, the courts in the United Kingdom have statutory authority to order discovery, and to grant a variety of provisional remedies. See discussion in the text at notes 86-88 *infra*.

compel arbitration and enforce the award. No U.S. court has denied that an attachment after the rendering of an arbitral award is proper to enforce the award.<sup>75</sup> An attachment before the award is simply an exercise of the same enforcement function. As recognized by Judge Hand in *Murray Oil*, pre-award attachment makes "as effective as possible recovery upon [arbitral] awards."<sup>76</sup>

Far from promoting the purposes of the New York Convention, cases like *McCreary* and *Cooper* frustrate them by denying the goal of uniformity among the states parties, which makes enforcement of arbitral awards less effective. As will be shown below, the courts in other states parties to the Convention consider it self-evident that provisional measures are an exercise of the courts' essential enforcement function, and thus further the purposes of the Convention. This conclusion is reflected in multilateral arbitration conventions and the rules of the major international arbitral regimes, which expressly authorize a party to an arbitration agreement to seek provisional measures from a court.<sup>77</sup> In light of the consensus on this issue outside the United

<sup>75</sup> See *Cooper*, 57 N.Y.2d at 416, 456 N.Y.S.2d at 732 (the New York Convention authorizes "judicial intervention after the arbitral award is rendered"). See also van den Berg, *supra* note 59, at 364 (no municipal court in any state party to the Convention "has doubted that an attachment in connection with the enforcement of an arbitral award, in order to secure payment under the award, is compatible with the Convention").

<sup>76</sup> 146 F.2d at 384.

<sup>77</sup> For example, Article VI(4) of the European Convention on International Commercial Arbitration provides: "A request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed to be incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court." Done at Geneva, Apr. 21, 1961, 484 UNTS 364. Article 9 of the Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law on June 21, 1985, provides: "It is not incompatible with the arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure." 24 ILM 1302, 1304 (1985). Article 8(5) of the ICC Rules, *supra* note 2, provides:

Before the file is transmitted to the arbitrator, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures, and they shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant powers reserved to the arbitrator.

Article 26(3) of the UNCITRAL Rules, *supra* note 2, provides: "A request for interim measures addressed by one party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement." Article 47(a) of the AAA Rules, *supra* note 2, provides: "No judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate."

But see ICSID Rules, *supra* note 2, which do not make similar provision. Indeed, in *Guinea v. Atlantic Triton Co.*, reported in 24 ILM 340 (1985), the Court of Appeal of Rennes vacated an arrest of three ships on the ground that Article 26 of the ICSID Convention provides that arbitration shall be the exclusive remedy for parties to an ICSID arbitration agreement. The ICSID Convention, however, is unique in that Article 54(1) provides that "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." Unlike the New York Convention, which provides numerous grounds for refusing to enforce a foreign arbitral award (see note 70 *supra*), an ICSID award *must* be enforced by the courts in any contracting state.

States, foreign commentators have rightfully criticized U.S. court decisions denying pre-award attachments under the New York Convention.<sup>78</sup>

## II. ENGLAND

The New York Convention entered into force for the United Kingdom on December 23, 1975.<sup>79</sup> The implementing legislation was the Arbitration Act of 1975,<sup>80</sup> section 1(1) of which provides:

If any party to an arbitration agreement to which this section applies . . . commences any legal proceedings in any court against any other party to the agreement . . . in respect of any matter agreed to be referred [to arbitration], any party to the proceedings may . . . apply to the court to stay the proceedings.<sup>81</sup>

Unless the court determines the arbitration agreement to be "null and void, inoperable or incapable of being performed," the court "shall make an order staying the proceedings."<sup>82</sup>

Section 1(1) applies to any arbitration agreement that is not "domestic,"<sup>83</sup> i.e., any agreement providing for arbitration outside the United Kingdom, or to which one of the parties is not a resident of the United Kingdom.<sup>84</sup> "Domestic" arbitration agreements continue to be governed by the Arbitration Act of 1950.<sup>85</sup> English arbitration law thus parallels the U.S. Arbitration Act, chapter 1 of which (like the 1950 Arbitration Act) governs domestic arbitration agreements, and chapter 2 (like the 1975 Arbitration Act), arbitration agreements falling under the New York Convention.

Section 12(6) of the 1950 Arbitration Act provides that even though the court may refer the parties to arbitration, it has the same power to make orders as it would if there were no arbitration agreement, including such measures as: "(a) security for costs"; "(f) securing the amount in dispute in the reference"; and "(h) interim injunctions or the appointment of a re-

<sup>78</sup> See, e.g., van den Berg, *Commentary Volume VII*, 7 Y.B. COM. ARB. 290, 299 (1982):

As far as the judicial involvement is concerned, the [New York] Convention only precludes that a court will interfere with the merits of a dispute which is, or is to be referred to arbitration. It does not preclude a competent national judiciary from coming to the aid in arbitration by granting attachment. . . .

See also INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION, pt. I.B.1 (G. Gaja ed. 1984); G. DELAUME, TRANSNATIONAL CONTRACTS: APPLICABLE LAW AND SETTLEMENT OF DISPUTES 79-87 (1975).

<sup>79</sup> Arbitration Act 1975 (Commencement) Order 1975, 1975 STAT. INST., No. 1662. As of Jan. 1, 1985, the United Kingdom had extended the Convention to Gibraltar, Bermuda, Hong Kong, the Isle of Man and the Cayman Islands. TREATIES IN FORCE, *supra* note 1, at 208 n.11.

<sup>80</sup> Ch. 3, *reprinted in* 2 INTERNATIONAL COMMERCIAL ARBITRATION, Doc. VII.E.2, at 87 (1983).

<sup>81</sup> *Id.* §1(1).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* §1(2).

<sup>84</sup> *Id.* §1(4). For purposes of §1, a corporation is deemed a UK resident if it is incorporated in or if its "central management and control" is exercised in the United Kingdom. *Id.* §1(b).

<sup>85</sup> 14 Geo. 6, ch. 27, *reprinted in* INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 80, Doc. VII.E.1, at 59.



ceiver."<sup>86</sup> Section 12(6) embodies the English legal concept of the close and complementary relationship between judicial and arbitral proceedings. "This involves a measure of control or supervision by the courts over arbitrations, as well as various means whereby the courts assist references to arbitration and the conduct of arbitrations."<sup>87</sup> Thus, section 12(6) empowers the English courts by statute "to lend their assistance to arbitrations in different ways," including discovery and interim injunctions to secure the amount in dispute.<sup>88</sup>

Since the New York Convention entered into force, the English courts have held that pre-award remedies under section 12(6) of the 1950 Arbitration Act are available when the court stays an action pursuant to section 1(1) of the 1975 Arbitration Act. The leading case is *The Rena K*,<sup>89</sup> where plaintiff cargo owners brought an action in rem to arrest a ship and an action in personam against the shipowners. The charter agreement provided for arbitration in the event of a dispute. Defendants moved for release of the ship from arrest and a stay of the court proceedings pending arbitration.

Mr. Justice Brandon held that the shipowners were entitled to release of the ship. Although section 12(6) of the 1950 Arbitration Act empowered the court to grant pre-award remedies, for example to secure the amount in dispute, that "did not give the Court power to arrest a ship, or to keep her under arrest, in order to provide security for the claim of a claimant in an arbitration."<sup>90</sup> The court had authority to retain the vessel as security only to satisfy "a judgment or settlement in the [in rem] action in which security has been given."<sup>91</sup>

With regard to the in personam action, however, Mr. Justice Brandon issued the *Mareva* injunction<sup>92</sup> requested by the plaintiffs to restrain the defendant shipowners from moving the ship.

<sup>86</sup> *Id.* §12(6). In addition, §12(6) empowers the English courts to issue pre-award orders regarding the production and taking of evidence (§12(6)(b), (c) and (d)), and the detention, preservation, interim custody, or sale of goods or property that is the subject matter of the arbitration (§12(6)(e) and (g)). *Id.*

<sup>87</sup> *Bank Mellat v. Helliniki Techniki S.A.*, [1983] 3 W.L.R. 783, 789.

<sup>88</sup> *Id.* <sup>89</sup> [1978] 1 Lloyd's L.R. 545.

<sup>90</sup> *Id.* at 556.

<sup>91</sup> *Id.* at 558. *Accord* *The Vasso*, [1984] 1 Lloyd's L.R. 235; *The Tuyuti*, [1984] 2 Lloyd's L.R. 51.

<sup>92</sup> A *Mareva* injunction is similar to a preliminary injunction in the United States.

The [*Mareva*] injunction takes the form of an order restraining the defendant, by himself his servants or agents, from selling, disposing of or otherwise dealing with such moneys or chattels or from removing them out of the jurisdiction, usually until further order. Its purpose is to ensure that, if the plaintiff succeeds in the action, there will be property of the defendant available here out of which the judgment which the plaintiff obtains in it can be satisfied.

*The Rena K*, [1978] 1 Lloyd's L.R. at 561. As with a preliminary injunction in the United States (*see, e.g.*, Rule 65 of the Federal Rules of Civil Procedure), the plaintiff must demonstrate a likelihood of success on the merits and the risk of dissipation of the defendant's assets. For a detailed discussion of the law regarding *Mareva* injunctions, *see* *The Niedersachsen*, [1983] 2 Lloyd's L.R. 600. *See also* *Mareva Compania Naviera, S.A. v. International Bulk Carriers, Ltd.*, [1975] 2 Lloyd's L.R. 509 (C.A.).

On the footing that the procedure is available to provide a plaintiff, in a case where no question of arbitration arises, with security for any judgment which he may obtain in an action, I see no good reason in principle why it should not also be available to provide a plaintiff, whose action is being stayed on the application of a defendant in order that the claim may be decided by arbitration in accordance with an arbitration agreement between them, with security for the payment of any award which the plaintiff may obtain in the arbitration.<sup>93</sup>

Although no specific statutory authority was required to justify this extension of the *Mareva* injunction procedure, "[i]f such specific authority is required, however, I think that it is to be found in s. 12(6) of the 1950 [Arbitration] Act."<sup>94</sup>

*The Rena K* involved a maritime and not a commercial contract, but its application is not limited to maritime cases. "[T]he Commercial Court [also] has granted injunctions on [the basis of section 12(6)] in a number of unreported cases."<sup>95</sup> The distinction drawn by Mr. Justice Brandon in denying the request to arrest the ship, but granting a *Mareva* injunction, was based on the nature of the remedy, not the nature of the case. As observed by Mr. Justice Sheen in *The Tuyuti*, there are "many fundamental differences between an injunction, which is an order directed to the owners and master of the ship not to take a ship out of the jurisdiction and an arrest by which the Admiralty Marshal takes custody of the ship."<sup>96</sup> Section 12(6) expressly authorized the former remedy but not the latter.<sup>97</sup>

In contrast to the UK Arbitration Act of 1950, chapter 1 of the U.S. Arbitration Act does not expressly authorize a court to issue an injunction or attachment to secure the amount in an arbitrable dispute. Section 8 of the Act does provide for "libel and seizure of [a] vessel," but only in "a cause of action otherwise justiciable in admiralty."<sup>98</sup> The U.S. courts in the

<sup>93</sup> [1978] 1 Lloyd's L.R. at 561.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* See *The Tuyuti*, where the court, though not confronted with the issue, stated that the decision in *The Rena K* was "well founded." [1984] 2 Lloyd's L.R. at 63. See also *Astro Exito Navegacion S.A. v. Chase Manhattan Bank N.A.*, [1983] 3 W.L.R. 130, 139 (H.L.) (it was undisputed that the court had power under §12(6) to make an order in aid of the sellers' claim for specific performance in an arbitration). Cf. *Bank Mellat v. Helliniki Techniki S.A.*, [1983] 3 W.L.R. 783, where the court declined to exercise its authority under §12(6)(a) of the 1950 Arbitration Act to order defendant to provide security for plaintiff's costs and legal fees in an ICC arbitration (as opposed to securing the amount in dispute). Because the ICC Rules required the parties to make a deposit to cover the costs of the arbitration, the court concluded: "An order for security for costs against the defendants would have the effect of compelling them to make a double deposit of this sum, first to the I.C.C., and secondly, by way of security in favour of the plaintiffs." [1983] 3 W.L.R. at 793.

<sup>96</sup> [1984] 2 Lloyd's L.R. at 56.

<sup>97</sup> In 1982 Parliament enacted the Civil Jurisdiction and Judgments Act 1982, ch. 27. Section 26 of that Act empowers the English courts to order an arrested ship to be retained as security for satisfaction of an arbitral award, or to order that a stay and referral to arbitration be conditional on the provision of equivalent security. Although the Act has not entered into force in its entirety, §26 entered into force on Nov. 1, 1984. Civil Jurisdiction and Judgments Act 1982 (Commencement No. 1) Order 1984, 1984 STAT. INST., No. 1553.

<sup>98</sup> 9 U.S.C. §8 (1984).

"maritime exception" cases therefore have distinguished not as to the remedy (arrest versus attachment) but as regards the nature of the case (maritime versus commercial).

That English case law regarding court-ordered provisional measures under the New York Convention is limited is not surprising. English law recognizes that such measures are clearly compatible with arbitration agreements, and hence with the New York Convention. Indeed, defendants in *The Rena K* did not even raise the argument that the power of the UK courts under section 12(6) of the 1950 Arbitration Act was limited when the United Kingdom became a party to the Convention.<sup>99</sup>

Although the relationship between judicial and arbitral proceedings in England "is well known to be considerably closer than . . . in the United States,"<sup>100</sup> this cannot justify or explain the result reached by some of the courts in the United States. The fact remains that in both countries the courts must play an integral role under the New York Convention in recognizing and enforcing foreign arbitral awards, and that a pre-award attachment or injunction to secure the amount in dispute is simply one exercise of that role.

### III. FRANCE

France ratified the New York Convention on June 26, 1959.<sup>101</sup> Under French constitutional law, in contrast to that of the United States and the United Kingdom, the Convention is self-executing and did not require implementing legislation.<sup>102</sup>

In 1980 and 1981 French arbitration law was thoroughly revised. The revised law, like the U.S. and UK arbitration statutes, distinguishes between domestic and international arbitration. Decree No. 80-354 of May 14, 1980<sup>103</sup> governs domestic arbitrations; Decree No. 81-500 of May 12,

<sup>99</sup> Mr. Justice Brandon discussed the Convention only in passing, and not in the context of the court's power to grant a pre-award injunction. [1978] 1 Lloyd's L.R. at 552.

<sup>100</sup> *Bank Mellat*, [1983] 3 W.L.R. at 789. Thus, for example, while the English courts actively assist in the production and taking of evidence during the arbitration (*see* notes 86-88 *supra* and accompanying text), the U.S. courts generally will not grant such requests, at least regarding the merits of the dispute. *See, e.g.,* *Lummus Co. v. Commonwealth Oil Ref. Co.*, 273 F.2d 613 (1st Cir. 1959); *Mississippi Power Co. v. Peabody Coal Co.*, 69 F.R.D. 558 (S.D. Miss. 1976); *Penn Tanker Co. of Del. v. C.H.Z. Rolimpex, Warszawa*, 199 F.Supp. 716 (S.D.N.Y. 1961). *But see* *International Ass'n of Heat & Frost Insulators v. Leona Lee Corp.*, 434 F.2d 192 (5th Cir. 1970) (discovery on the merits allowed before arbitral tribunal constituted if it would not delay arbitral proceedings); *Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F.Supp. 240 (E.D.N.Y. 1973). Discovery is available in U.S. courts regarding the issue of arbitrability. *See* *International Union of Elec., Radio & Mach. Workers v. Westinghouse Elec. Corp.*, 48 F.R.D. 298 (S.D.N.Y. 1969). It is available on the merits if there are exceptional circumstances. *See, e.g.,* *Bergen Shipping Co. v. Japan Marine Servs.*, 386 F.Supp. 430 (S.D.N.Y. 1974) (alien crew that plaintiff sought to depose was about to leave the United States); *Ferro Union Corp. v. SS Ionic Coast*, 43 F.R.D. 11 (S.D. Tex. 1967) (damaged ship that plaintiff wanted to inspect about to leave port).

<sup>101</sup> 1959 *Journal Officiel de la République Française* [J.O.] 8726.

<sup>102</sup> *See* CONST. art. 55 (Fr.).

<sup>103</sup> 1980 J.O. 1238 (effective Oct. 1, 1980).

1981<sup>104</sup> governs international arbitrations, defined as involving "the interests of international trade."<sup>105</sup> Both decrees have been codified in the New Code of Civil Procedure.<sup>106</sup>

The code provisions on international arbitration are entirely new, but reflect the special rules regarding international arbitration that had been developed by the French courts. In issuing decree No. 81-500, the French Government emphasized that it did not "upse[t] the principles laid down by the case law of the Supreme Court [Cour de cassation] as far as international arbitrations are concerned, nor those rules resulting in this domain from international conventions ratified in France."<sup>107</sup> Thus, for example, Article VI(4) of the European Convention on International Commercial Arbitration,<sup>108</sup> which entered into force for France on February 16, 1967, continues to provide an express basis for court-ordered provisional measures. Although there is no such express authority in the new arbitration law, the French courts have consistently held that the competence of an arbitral tribunal does not preclude a court from ordering provisional measures, including attachments (*saisies conservatoires*<sup>109</sup>).

In *Société EURODIF v. République islamique d'Iran*, the Government of Iran and the Iranian Atomic Energy Organization had entered into an industrial cooperation agreement in 1974 with the French Atomic Energy Commission (CEA). Together with similar organizations from three other European countries, the CEA established EURODIF, a French corporation, for the purpose of constructing a uranium enrichment plant in France. Within the framework of the cooperation agreement, the Iranian Government entered into two contracts on February 23, 1975 regarding the EURODIF plant. It agreed to lend CEA a billion dollars to finance construction of the plant, in return for a 10 percent share of the enriched uranium to be produced. Repayment was scheduled over a 7-year period beginning in 1982, and was guaranteed by the French Government. In addition, Iran agreed to lend EURODIF 943 million francs over an 11-year term to finance the plant, and agreed also to make advances to EURODIF to pay for its operating

<sup>104</sup> 1981 J.O. 1380 (effective May 14, 1981).

<sup>105</sup> NOUVEAU CODE DE PROCÉDURE CIVILE [N. C. PR. CIV.], Art. 1492.

<sup>106</sup> N. C. PR. CIV., tit. IV. Titles 1 to 4 incorporate the decree on domestic arbitration. Titles 5 and 6 incorporate the decree on international arbitration.

<sup>107</sup> *Report of the Keeper of the Seals, Ministry of Justice, to the Prime Minister on the draft of the decree instituting the provisions of Parts III and IV of the New Code of Civil Procedure, republished in J.-L. DELVOLVÉ, ARBITRATION IN FRANCE, App. II, at 94 (Eng. ed. 1982).*

<sup>108</sup> See note 77 *supra*.

<sup>109</sup> Article 48 of the old Code of Civil Procedure (which article was not abrogated by the new code) provides:

In case of urgency and if the recovery of the claim seems to be in danger, the President of the *tribunal de grande instance* or the *juge d'instance* for the domicile of the debtor or for the areas where the goods to be seized are situated, may authorize any claimant whose claim appears well founded to seize for conservation, chattels belonging to his debtor.

The attachment is an *ex parte* proceeding (*ordonnance sur requête*), in contrast to a proceeding *en référé* where both parties are heard. See note 112 *infra*.

costs. The two contracts provided for ICC arbitration in the event of a dispute.

After the revolution in Iran, the new Government ceased its nuclear development program and defaulted on the loan to EURODIF. EURODIF commenced an ICC arbitration and petitioned for an attachment to secure the unpaid amount of the loan and other damages (approximately 9 billion francs). The President of the Commercial Tribunal of Paris granted the attachment against Iran's right to payment of the interest on the billion-dollar loan to CEA and, beginning in 1982, to repayment of the principal of that loan.

The Court of Appeal of Paris set aside the order of attachment, however, not because of any conflict between the court's jurisdiction and the arbitration clause, but because it concluded that the attached funds were of a public nature and hence immune.<sup>110</sup> The Court of Cassation reversed and remanded the case because the Court of Appeal had not inquired into whether Iran had allocated the attached property to carrying out a commercial activity.<sup>111</sup> Like the Court of Appeal, the Court of Cassation did not question the propriety of ordering an attachment to secure the amount of a claim in an arbitrable dispute.

In addition to attachments, the French courts have ordered a variety of other provisional measures even though the parties had agreed to arbitration of disputes.<sup>112</sup> Thus, courts may order, *inter alia*: measures of instruction to conserve or establish evidence upon which the outcome of the dispute might depend (e.g., expert reports or inspection of property),<sup>113</sup> interlocutory payment,<sup>114</sup> and conservatory or reparatory measures to prevent imminent damage or to halt a patently unlawful act.<sup>115</sup> In general, all of the provisional measures that a court can order in cases that do not involve an arbitration clause are available where there is an arbitration clause.

<sup>110</sup> Judgment of Apr. 21, 1982, Cour d'appel de Paris, 110 JOURNAL DE DROIT INTERNATIONAL 145 (1983).

<sup>111</sup> Judgment of Mar. 14, 1984, Cass. civ. 1re, 1984 Juris-Classeur périodique [J.C.P.] II, at 20,205 (1r arrêt), 23 ILM 1063 (1984).

<sup>112</sup> See Société d'Exploitation du Cinema REX v. Société Rex, Judgment of June 7, 1979, Cass. civ. 3e, 1979 Bull. Civ. III, at 93 ("the existence of a compromissory clause does not, in case of urgency duly established, deprive the jurisdiction of courts *en référé* from exercising their powers").

The *ordonnance de référé* is a provisional order rendered at the request of one party, the other party present or having been summoned, in cases where the law confers upon a judge who has not been empowered to hear the main issue, the power to render immediately the necessary orders.

N. C. PR. CIV., Art. 484. The procedures for obtaining such an order are set forth in Articles 482-492 of the New Code of Civil Procedure. The same orders that can be issued by a court sitting *en référé* can be issued in an *ex parte* proceeding (*ordonnance sur requête*) if exigent circumstances exist. See, e.g., N. C. PR. CIV., Arts. 812 and 875.

<sup>113</sup> N. C. PR. CIV., Art. 145.

<sup>114</sup> *Id.*, Art. 809 (Tribunal de grande instance); Art. 849 (Tribunal d'instance); Art. 873 (Tribunal de commerce).

<sup>115</sup> *Id.*, Art. 809 (Tribunal de grande instance); Art. 849 (Tribunal d'instance); Art. 873 (Tribunal de commerce).

In *Société Immobilière Le Panorama v. Société Immobilière et Mobilière du Tertre*,<sup>116</sup> for example, the defendant (SIMT) sold a parcel of land to another company, which resold it to the plaintiff (Panorama). The contracts of sale provided that the purchaser would build four parking spaces on the lot for SIMT, unless, for reasons beyond the purchaser's control, construction of the spaces was not possible. The contracts also provided for arbitration. A dispute arose, and Panorama obtained a court order appointing an expert to determine if the parking spaces could be constructed. SIMT argued that the court lacked jurisdiction, but the Court of Cassation affirmed the order. "[T]he existence of an arbitration agreement is not an obstacle to the recognized power of a judge . . . to order . . . measures of instruction . . . if there exists a legitimate reason to conserve or establish proof of facts" concerning the issue in dispute.<sup>117</sup>

Similarly, in *Société Civile Immobilière LA LAGUNE v. S.A.R. SERCIF*,<sup>118</sup> the Court of Cassation affirmed a lower court order of an interlocutory payment to the plaintiff. Defendant argued that the courts lacked jurisdiction to render such an order, because the dispute was covered by an arbitration agreement. The Court disagreed: "the existence of an arbitration agreement did not exclude the competence of the judge . . . to grant a payment to a claimant of an obligation not seriously in dispute."<sup>119</sup>

Like the courts in England, the French courts do not see any inconsistency between the jurisdiction of a court to order provisional measures, including attachments, and the competence of an arbitral tribunal to decide the merits

<sup>116</sup> Judgment of Dec. 20, 1982, Cass. civ. 3e, 1983 Bulletin des arrêts de la Cour de cassation, Troisième section civile 195.

<sup>117</sup> *Id.* See *Lejars v. Helezen*, Judgment of July 3, 1951, Cass. comm., 1951 Dalloz, Jurisprudence [D. Jur.] 701 (where the Court of Cassation affirmed an order appointing an expert to inspect a delivery of beans even though the contract of sale contained an arbitration clause: "Such an arbitration clause did not deprive . . . the president of the commercial court *en référé*, presented with a case of urgency . . . [from issuing an order] of a purely conservatory nature. . . ."); *Georges Bernard v. Société General Mercantile Co.*, Judgment of June 21, 1904, Cass. req., 1906 Périodique et critique I, at 395 (although a contract for the sale of corn provided for arbitration, the court nevertheless issued an order appointing an expert to inspect the allegedly damaged goods). See also *Compagnie d'assurances La Vigilance v. Dumas*, Judgment of Dec. 4, 1953, Cass. civ. 2e, 1954 D. Jur. 108 (Court of Cassation reversed a decision of the Court of Appeal of Bourges that it lacked jurisdiction to appoint an escrow agent because of an arbitration agreement between the parties).

<sup>118</sup> Judgment of July 9, 1979, Cass. civ. 3e, 1980 REVUE D'ARBITRAGE 78.

<sup>119</sup> *Id.* But see *République Islamique d'Iran v. Commissariat à l'Energie Atomique*, Judgment of Mar. 14, 1984, Cass. civ. 1re, 1984 J.C.P. II, at 20,205 (2e arrêt), a companion case to the *EURODIF* case discussed above, where Iran filed a petition for an interlocutory payment by the French Atomic Energy Commission (CEA) and France. Both the lower court and the Court of Appeal of Paris denied the petition on the ground that both the loan agreement between the CEA and Iran and the guaranty by the French Government were governmental agreements and hence outside the jurisdiction of the courts. The Court of Cassation affirmed the decision, but on completely different grounds. While recognizing that a court may order interim and conservatory measures even though the parties have agreed to arbitration, the Court held that an order of interlocutory payment *after* an arbitral proceeding has commenced could not be properly characterized as an interim or conservatory measure. Such an order would touch on the merits of the case, which the arbitral tribunal alone was competent to decide.

of a dispute. French law recognizes that "[s]uch judicial intervention, under appropriate circumstances, usually serves to encourage arbitration especially at the international level as it allows the parties to take immediate measures necessary to ensure that the award will be enforceable once rendered."<sup>120</sup> Court-ordered provisional measures thus further the purposes of the New York Convention by making enforcement of an arbitral award as effective as possible.

#### CONCLUSION

Because of the incorrect decisions of some courts, the availability of pre-award attachment under the New York Convention remains haphazard and uncertain in the United States, in contrast to other countries. It is to be hoped that the analysis set forth in this article will encourage American courts to follow the practice of courts in other states parties as to the availability of court-ordered provisional measures, which, far from being inconsistent with the New York Convention, actively advance its goals.

Continued litigation of this issue in the U.S. courts, however, in view of the present split of authority, could prove costly and hence deter plaintiffs from seeking pre-award attachments and the eventual correction of the law. The authors submit that the Legal Adviser of the Department of State therefore should consider assisting the process in an appropriate case by causing the United States to appear as *amicus curiae* in support of pre-award attachment as a suitable measure under the New York Convention. Indeed, even absent such an appearance, an authoritative statement by the Legal Adviser to the effect that, properly interpreted, the Convention permits such measures could itself go far towards producing the desired result.

If all else fails, the executive branch and Congress could readily solve this problem by amending chapter 2 of the U.S. Arbitration Act to provide express authority for the courts to grant pre-award provisional measures such as attachments. Indeed, there appears to be every reason to pursue this course simultaneously with those noted above, to maximize the possibility that the Convention will be applied correctly and uniformly in the United States.

<sup>120</sup> Buhart, *Attachments and Other Interim Court Remedies in Support of Arbitration*, INT'L BUS. LAW., March 1984, at 107, 110.

# THE SECRET WAR IN CENTRAL AMERICA AND THE FUTURE OF WORLD ORDER

By John Norton Moore\*

## I. INTRODUCTION

The core principle of modern world order is that aggressive attack is prohibited in international relations and that necessary and proportional force may be used in response to such an attack. This dual principle is embodied in Articles 2(4) and 51 of the United Nations Charter, Articles 21 and 22 of the revised Charter of the Organization of American States (OAS) and virtually every modern normative statement about the use of force in international relations. Indeed, it is the most important principle to emerge in more than two thousand years of human thought about the prevention of war. In the contemporary world of conflicting ideologies and nuclear threat, no task is more important for international lawyers and statesmen than to maintain the integrity of this principle in both its critical—and reciprocal—dimensions: prohibition of aggression and maintenance of the right of effective defense.<sup>1</sup>

Today this core principle faces a fundamental threat. That threat has already contributed to a serious destabilization of world order and, unless arrested, holds potential for the complete collapse of constraints on the use of force. It takes the form of an assault on world order by radical regimes that share an antipathy to democratic values and a “true belief” in the use of force to spread their ideology.<sup>2</sup> By maintaining that the achievement of

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This article is excerpted from a more detailed monograph to be published in the near future. The author wishes to thank Steven P. Soper and the staff of the Center for Law and National Security of the University of Virginia for their assistance in the research and preparation of footnotes for this article, and Robert F. Turner for his helpful comments on an early draft. The views expressed are those of the author and do not necessarily express the position of the United States Government or any other organization with which the author has been affiliated.

<sup>1</sup> For an excellent discussion of this Charter principle and its contemporary importance, see M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 232 (1961).

<sup>2</sup> Such assaults by radical regimes are characterized by the use of covert attack and terrorism by a growing network of states, and by a growing specialization of function in these attacks. See S. HOSMER & T. WOLFE, *SOVIET POLICY AND PRACTICE TOWARD THIRD WORLD CONFLICTS* 102 (1983).

Similarly, Professor Paul Seabury writes, on the basis of the Grenada documents, that “in the 1970s and 1980s new forms of fraternal collaboration evolved in the expansionist strategies



"revolutionary internationalism" justifies the use of force, these regimes simultaneously fight a guerrilla war against the core Charter principle and publicly deny any state-sanctioned use of force so as to gain the protection of the very legal order they are attacking.<sup>3</sup> Thus, their assault undermines both the authority of the prohibition of aggression and the effectiveness of the right of defense.<sup>4</sup> Nowhere has this assault been more threatening—and harmful to the legal order—than in the contemporary Central American conflict.

## II. BACKGROUND OF THE CENTRAL AMERICAN CONFLICT

### *The Nicaraguan Revolution*

At the moment of its success, the 1979 revolution that overthrew President Anastasio Somoza in Nicaragua was broad-based and popular. It enjoyed the support of organized labor, professional and business groups, the church, campesinos and most segments of Nicaraguan society. Pursuant to an extraordinary OAS resolution of 1979<sup>5</sup> that recognized the insurgency against the sitting government of an OAS member, many democratic countries in Latin America, including Mexico, Venezuela, Panama and Costa Rica, supported the insurgents. Somoza had virtually no allies. The United States, for example, terminated military assistance 2 years before he was overthrown, encouraged other nations such as Israel and Guatemala to curtail their assistance<sup>6</sup> and even called the OAS meeting that precipitated his fall.

As a condition of OAS support, the 1979 resolution required the insurgents to support a democratic, pluralist and nonaligned Nicaragua. These conditions were accepted by the Sandinista National Liberation Front (FSLN)

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of the Soviet Union, its satellites, and Soviet-dominated movements in Asia, Africa, and Latin America." This collaboration consisted of the "intricate interweaving of Soviet, Cuban, Vietnamese, and Eastern European Communist activities of far-reaching scope." THE GRENADA PAPERS 5 (P. Seabury & W. McDougall eds. 1984). See also R. CLINE & Y. ALEXANDER, TERRORISM: THE SOVIET CONNECTION (1984); C. STERLING, THE TERROR NETWORK (1981); and SENATE SUBCOMM. ON SECURITY AND TERRORISM, 99TH CONG., 1ST SESS., STATE-SPONSORED TERRORISM (Comm. Print 1985) [hereinafter cited as STATE-SPONSORED TERRORISM].

<sup>3</sup> There is an interlinked fact-finding (intelligence) and political-legal (verification) problem not dissimilar to that in arms control in policing compliance with the Charter prohibition on aggressive force. These issues have not been generally addressed on aggressive use of force. For arms control, see DeSutter, *Intelligence versus Verification: Distinction, Confusions, and Consequences*, in INTELLIGENCE: POLICY AND PROCESS 297 (A. Maurer, M. Tunstall & J. Keogle eds., 1985).

<sup>4</sup> For a detailed description of this "radical regime assault" and its effect on the legal order, see Moore, *The Radical Regime Assault on the Legal Order* (June 10, 1985) (unpublished paper available from the Center for Law and National Security, the University of Virginia).

For a legal analysis of the Soviet doctrine of "revolutionary internationalism," see, e.g., Rostow, *Law and the Use of Force by States: The Brezhnev Doctrine*, 7 YALE J. WORLD PUB. ORD. 209 (1981).

<sup>5</sup> Res. II, OAS Doc. 40/79, rev.2 (June 23, 1979), adopted by the 17th Meeting of Consultation of Foreign Ministers by a vote of 17-2-5, reprinted in 79 DEP'T ST. BULL. 58 (1979).

<sup>6</sup> See Evans & Novak, *Latin Dominoes*, Wash. Post, Aug. 1, 1979, at A21, cols. 1-6.

in a cable of July 12, 1979 to the OAS.<sup>7</sup> In the immediate aftermath of the revolution, there was great hope—shared by the United States—that this pledge would be kept. Initially, the new Government included prominent Nicaraguans of all political persuasions, received broad public support and embarked on ambitious programs to improve literacy, health care delivery and social security. It was greeted by an outpouring of economic support and good will from all over the world. Sadly, however, as we will see in a subsequent section of this paper, the nine Marxist-Leninist comandantes who had controlled the effective military insurgency progressively assumed power and thus caused a purge of genuine democrats. In addition, the comandantes curtailed civil and political rights, denied free elections, initiated massive militarization of society and, in general, began to move sharply toward Cuban-style totalitarianism.

The Cuban effort to capture the effective military insurgency against Somoza seems to be the principal cause of this failure of the Nicaraguan democratic revolution. Castro had provided some arms and training to the FSLN during the early 1960s.<sup>8</sup> Beginning in 1977–1978, a high official of the Cuban “American Department,” Armando Ullis Estrada, made repeated secret trips to Nicaragua to unify the three major factions of the FSLN as a condition for receiving stepped-up Cuban aid. Apparently, the Cubans correctly perceived that the Carter administration’s cutoff of aid to Somoza, coupled with the widespread popular opposition to him, set favorable political and military conditions for his ouster and that unification of the three competing Marxist-Leninist guerrilla factions would enable them to control the military insurgency and thus take power.

Pursuant to this effort, the nine comandantes who currently rule Nicaragua were selected, three from each of the three factions, at meetings arranged by the Cubans,<sup>9</sup> and Cuba announced the unification during the XI World Youth Festival in Havana in late July 1978. Subsequently, substantial arms shipments were sent via Panama and Costa Rica to the FSLN and Cuban advisers were dispatched to northern Costa Rica to train and equip that force. The Cuban “American Department” established a secret operations center in San José to monitor and facilitate the assistance effort. In early 1979, Cuba also helped organize and arm an “internationalist brigade”

<sup>7</sup> See BUREAU OF PUBLIC AFFAIRS, DEP’T OF STATE, CURRENT POLICY NO. 601, REVIEW OF NICARAGUA’S COMMITMENTS TO THE OAS (1984).

<sup>8</sup> See D. NOLAN, *THE IDEOLOGY OF THE SANDINISTAS AND THE NICARAGUAN REVOLUTION* (1985). For additional discussion of the Marxist-Leninist credentials and background of the comandantes, see the six-part series in the *Los Angeles Herald* by Marie Linda Wolin on the Sandinista leadership, May 5–10, 1985. On early Sandinista ties to the PLO and training in PLO camps, see DEP’T OF STATE, *THE SANDINISTAS AND MIDDLE EASTERN RADICALS* (1985) [hereinafter cited as *SANDINISTAS AND MIDDLE EASTERN RADICALS*]. This unclassified report describes the participation of the Sandinistas in Middle Eastern aircraft hijacking and terrorism in 1970 and their continuing relations with these groups and states in the 1980s. (On Sept. 4, 1985, the day after the report was released, Tass angrily denounced it as a “new falsehood.”)

<sup>9</sup> See D. NOLAN, *supra* note 8, at 97–98. Auguste César Sandino, for whom the Sandinista Party was named, was not only a national hero but an anti-Communist as well. See *id.* at 16–18.

to fight with the FSLN. Many of its members were drawn from experienced Latin American extremist and terrorist groups.<sup>10</sup> When the FSLN final offensive was launched in mid-1979, as many as 50 Cuban military advisers participated and maintained regular radio contact with Havana.

Following the overthrow of Somoza, the chief of the secret Cuban coordinating center in San José was shifted to Managua, as the Cuban ambassador and Cuban "advisers" begin flooding into Nicaragua. An experienced colonel in the Cuban intelligence service took out Nicaraguan citizenship and became instrumental in guiding the Sandinista General Directorate of State Security (DGSE), which was modeled after the Cuban Directorate General of Intelligence (DGI). Today about 400 Cuban and 70 Soviet intelligence advisers work closely with the DGSE, together with East Germans and Bulgarians. The DGSE is being used by the Sandinistas, as is the DGI in Cuba, to infiltrate and keep watch over all segments of society.<sup>11</sup>

Thus, from the outset Cuba concentrated on ensuring that a hard-core Marxist-Leninist group was in charge of the effective military insurgency in Nicaragua. It was by far the most important source of assistance to that insurgency. Citing Shirley Christian's latest book, *Nicaragua: A Revolution in the Family*, Judge Stephen Schwebel informed the International Court of Justice that "'Costa Rican National Assembly investigators . . . estimated that at least one million pounds of war material entered Costa Rica from Cuba during . . . [the] period of six to eight weeks [before the end of the war in 1979 in Nicaragua], a figure that did not include what had been shipped earlier'."<sup>12</sup> After the takeover, Cuba provided assistance focused on strengthening the military and intelligence capabilities of the nine comandantes while building an internal security apparatus to consolidate their power, as Fidel Castro had done 20 years earlier. A principal difference from Cuban experience seems to be that, mindful of Western economic support, the Sandinistas have moved more slowly toward a thoroughgoing Marxist-Leninist model. Both governments, however, have sought to hide the true nature of their revolution.

Today the comandantes face substantial and growing internal opposition, as Nicaraguans increasingly perceive the democratic revolution as betrayed. The rapid growth in opposing "contra" forces in Nicaragua and the stream of recent defections, including, since 1979, two Nicaraguan ambassadors to

<sup>10</sup> See DEP'T OF STATE, SPECIAL REP. NO. 90, CUBA'S RENEWED SUPPORT FOR VIOLENCE 5-6 (1981).

<sup>11</sup> See DEP'T OF STATE, BROKEN PROMISES: SANDINISTA REPRESSION OF HUMAN RIGHTS IN NICARAGUA 2 (1984) [hereinafter cited as BROKEN PROMISES].

<sup>12</sup> International Court of Justice, Verbatim Record (Uncorrected) in the Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Sept. 13, 1985, at 44-45 [hereinafter cited as Verbatim Record]. For Christian's book, see note 258 *infra*.

During the writing of this article, the ICJ heard oral argument from Nicaragua on the merits phase of the *Nicaragua* case. No final decision had been rendered either on the merits or on the jurisdictional and admissibility issues joined to the merits phase. Under Article 53 of the ICJ Statute, when one of the parties does not appear, the Court must satisfy itself "that it has jurisdiction" and "that the claim is well-founded in fact and law."

the United States, provide dramatic evidence of a shift in popular Nicaraguan feeling about the comandantes.

*U.S. Relations with the New Sandinista Government*

The United States, concerned about human rights abuses and the need for social change in Nicaragua, cut off military assistance to the Somoza regime in 1977, 2 years before it was overthrown. But U.S. opposition to the regime was not merely passive. Former United States Ambassador to the United Nations Jeane Kirkpatrick writes that "the State Department acted repeatedly and at critical junctures to weaken the government of Anastasio Somoza and to strengthen his opponents."<sup>13</sup> Washington initiated the 1979 OAS resolution to recognize the insurgents and to isolate Somoza politically, and it used its influence to persuade other nations to withdraw support for his regime and to institute an arms and aid embargo against it. Thus, there should have been no reason for FSLN antagonism toward Washington unless such hostility was in fact rooted in FSLN ideology.

When the Sandinistas came to power, the United States made every effort to establish good relations with the new regime. In part, this special effort resulted from the belief of some members of the Carter administration that Castro might have been forced into the Soviets' arms by early U.S. hostility to his regime.<sup>14</sup> Whatever the reason, the effort was significant and genuine. President Carter invited Comandante Daniel Ortega to the White House to discuss ways of creating good relations and to underscore the seriousness of the U.S. interest in establishing them. The United States gave \$118 million in economic assistance, including over 100,000 tons of food, to the regime during the first 2 years. (This was more aid than was given by any other nation and overwhelmingly more than the United States had given to the Somoza regime at any time.) The first of these shipments of food began arriving in DC-8 stretch jets within 3 days of the Sandinista takeover as part of a general effort to feed the thousands of persons displaced by the war. The United States also supported \$292 million in World Bank and Inter-American Development Bank loans to the Sandinistas.<sup>15</sup> The United States offered Peace Corps teachers, but the Sandinistas refused to accept a single one, although they welcomed thousands of Cuban and assorted Soviet-bloc and other radical advisers. The United States also provided immediate medical assistance, but by 1980 such programs as the 15-year-old Partners of the Americas Program between the state of Wisconsin and Nicaragua ran

<sup>13</sup> Kirkpatrick, *U.S. Security and Latin America*, in *RIFT AND REVOLUTION: THE CENTRAL AMERICAN IMBROGLIO* 329, 344 (H. Wiarda ed. 1984).

<sup>14</sup> This conclusion is, I believe, largely a myth. See, e.g., the contrary evidence, including Fidel Castro's own rejection of the thesis, in *DEP'T OF STATE & DEP'T OF DEFENSE, THE SOVIET-CUBAN CONNECTION IN CENTRAL AMERICA AND THE CARIBBEAN* 5-6 (1985) [hereinafter cited as *SOVIET-CUBAN CONNECTION*].

<sup>15</sup> This amount may be double the total given the Somoza regime in the preceding 20 years. See Kirkpatrick, *This Time We Know What's Happening*, *Wash. Post*, Apr. 17, 1983, at D8, cols. 2-6.

into severe Sandinista harassment. Even the Salvation Army, well known for its work with the poor, was forced out of Nicaragua by the Sandinistas.

Lawrence E. Harrison, Director of USAID in Nicaragua from 1979 to 1981, has written a detailed account of the U.S. effort to have good relations with the Sandinistas and their vituperative attacks on the United States in response. One vignette is particularly revealing. Harrison writes:

We often expressed our concern to Sandinista officials about the line in the Sandinista anthem, "We shall fight against the Yankee, enemy of humanity." In November 1979, Jaime Wheelock, one of the most influential *comandantes* and a person with whom I sustained a very frank dialogue throughout my two years in Managua, told me that the word "poverty" was going to be substituted for "the Yankee." Soon thereafter, I was told the same thing by then economic czar (and Stanford MBA) Alfredo Cesar, who has since defected. The change was never made.<sup>16</sup>

After a careful review, the bipartisan Kissinger Commission concluded that the United States "undertook a patient and concerted effort to build a constructive relationship of mutual trust with the new government."<sup>17</sup>

The United States was not alone in experiencing Sandinista intransigence. Panama sought to provide military training assistance for the Sandinista army, but this was likewise terminated in favor of thousands of advisers from Cuba, the Soviet bloc and other radical regimes. Similarly, the Sandinistas rebuffed an offer of assistance from Costa Rica.<sup>18</sup>

While the United States was striving to build good relations with the Sandinistas, the *comandantes* were secretly concluding military agreements with Soviet-bloc countries, beginning a massive military buildup and joining with the Cubans in launching an intense secret guerrilla war against El Salvador and Guatemala and armed subversion against Costa Rica and Honduras. In its waning weeks in office in late 1980, as intelligence data unmistakably began to show the extent and seriousness of this secret attack, the Carter administration informally suspended economic assistance to the Sandinistas.

### *The Sandinista Response*

The Sandinistas responded to the extraordinary support of the OAS for their insurgency and the outpouring of democratic aid by deliberately and carefully adopting three policies that are the root cause of the threat to world order in Central America. To provide an understanding of the full context of that threat, this article will briefly examine each of these policies.

<sup>16</sup> Harrison, *We Tried to Accept Nicaragua's Revolution*, Wash. Post, June 30, 1983, at A27, cols. 2-5. Similarly, a litany chanted by Sandinista mobs, and apparently taught to schoolchildren, is "Here, there, the Yankees will die." See CBS News, "60 Minutes," Oct. 27, 1985.

<sup>17</sup> APPENDIX TO THE REPORT OF THE NATIONAL BIPARTISAN COMMISSION ON CENTRAL AMERICA 45 (1984).

<sup>18</sup> See Millett, *Central American Paralysis*, in *FOREIGN POLICY ON LATIN AMERICA, 1970-1980*, at 163, 168 (staff of *Foreign Policy* eds. 1983).

It should be emphasized, however, that it is the third of these policies, the secret war against neighboring states, that violates the critical UN and OAS Charter prohibitions against the use of force and gives rise to the right of defense in response. The first two policies, the suppression of democratic pluralism and the massive ideologically aligned military buildup, breach the 1979 FSLN pledge to the OAS;<sup>19</sup> and the Sandinistas' repeated offenses against native populations, organized labor, the Catholic Church and other groups in Nicaraguan society violate important international human rights guarantees.<sup>20</sup> Nevertheless, with respect to the use of force, the ongoing Cuban-Nicaraguan armed aggression is solely determinative.<sup>21</sup>

*Pluralism, Human Rights and Nonalignment.* When the Sandinistas initially came to power, many who were allied with them against Somoza were genuine nationalists and strong supporters of human rights and the traditional Latin values of pluralism and nonalignment. The goals of the pluralist revolution against Somoza were embodied in the National Unity Government Program enacted as the Fundamental Statute of the Republic on the first day after the revolution.<sup>22</sup> As the comandantes began to consolidate power through a Leninist "vanguard" party, however, these moderate elements began leaving voluntarily and under Sandinista pressure.<sup>23</sup>

<sup>19</sup> The creeping imposition of totalitarian controls by the comandantes also seems to be inconsistent with Article 3(d) of the revised OAS Charter, which provides: "The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy."

<sup>20</sup> For a minimum list of violations, see Arts. 4, 7, 12, 13 and 23, American Convention on Human Rights, Nov. 22, 1969, reprinted in ORGANIZATION OF AMERICAN STATES, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L/V/II.60, Doc. 28 (1983) (Nicaragua became a party on Sept. 5, 1979); Art. 8(c), International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966) (Nicaragua became a party on Mar. 12, 1980). On Nicaragua's restrictions on the press in violation of international law, see INTERNATIONAL HUMAN RIGHTS LAW GROUP, GOVERNMENT RESTRICTIONS ON THE PRESS IN NICARAGUA: THE STATE OF EMERGENCY AND INTERNATIONAL LAW (1983). According to this report: "The resulting restrictions on freedom of the press, before and during the State of Emergency, have gone beyond the boundaries set by international human rights law. . . ." *Id.* at 35.

Compare generally the Sandinista human rights shortcomings discussed in this paper with the Universal Declaration of Human Rights, GA Res. 217A, UN Doc. A/810, at 71 (1948); the International Covenant on Civil and Political Rights, GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277.

<sup>21</sup> Although some scholars support a right of humanitarian intervention, I believe that the core issue in the Central American conflict is aggression and defensive response. For a general discussion of the right of humanitarian intervention, see, e.g., Moore, *Toward an Applied Theory for the Regulation of Intervention*, in LAW AND CIVIL WAR IN THE MODERN WORLD 3, 24-25 (J. Moore ed. 1974); Brownlie, *Humanitarian Intervention*, in *id.* at 217; and Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in *id.* at 229.

<sup>22</sup> CONSEJO SUPERIOR DE LA EMPRESA PRIVADA [COSEP], THE NICARAGUAN REVOLUTIONARY PROCESS 1979-1985, at 5-6 (rev. ed. 1985) [hereinafter cited as COSEP].

<sup>23</sup> See generally BROKEN PROMISES, *supra* note 11. The strategy of insurrection presented by the FSLN National Directorate in 1977, 2 years before the overthrow of Somoza, included a directive to "[c]reate a 'broad anti-Somoza front' based on the program that includes bourgeois/

On August 30, 1980, the Sandinista Party leadership, as the head of the "vanguard" party, proclaimed itself the highest authority in Nicaragua. Subsequently, the governing junta in charge of the executive branch seems to have been subordinated to the Sandinista Party.<sup>24</sup> Even earlier, on April 16, 1980, the comandantes had pushed through Decree No. 374, which, by dramatically increasing the number of seats in the legislative council, secured a substantial majority for the Sandinista Party in the legislative branch. This decree prompted the resignation of junta member Alfonso Robelo, now a leader of one faction of the contras fighting against the comandantes. Robelo and others believed that the governing junta had no authority to modify the Fundamental Statute of the Republic. Similarly, though the Fundamental Statute created an independent judiciary, the comandantes quickly instituted a series of "special courts" outside the regular judicial system, which were politically controlled by the Sandinista "vanguard." These included "Special Courts" established in November 1979, "Military Courts" (December 2, 1980), "Agrarian Courts" (July 19, 1981) and "Anti-Somocista People's Courts" (April 11, 1983).<sup>25</sup>

As they openly assumed political power, the comandantes began to put in place the familiar apparatus of a totalitarian police state: it was marked by the suppression of labor movements, attacks on the church and religious freedom, attacks on the semi-autonomous Indians of the Atlantic region, attacks on and the clandestine murder of political opponents, press controls and censorship, a Cuban-style internal security system down to the block level, a virtual merger of the Sandinista Party with the state, sham trials by "people's courts" and, ultimately, the suspension of the right of habeas corpus, detention of growing numbers of political prisoners and institution of a massive state propaganda system. Many other violations of human rights and political freedoms under the Sandinistas have been reported, including recurrent accounts of anti-Semitism<sup>26</sup> and the formal implementation of

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democratic opposition groups, but preserves the hegemony of FSLN power." D. NOLAN, *supra* note 8, at 78.

On the importance of establishing a "vanguard party" in Marxist-Leninist theory, see generally, e.g., V. LENIN, *WHAT IS TO BE DONE?* (1907); T. HAMMOND, *THE ANATOMY OF COMMUNIST TAKEOVERS* (1975); and R. CAREW HUNT, *THE THEORY AND PRACTICE OF COMMUNISM* (1963). The concept is antithetical to representative democracy.

<sup>24</sup> See COSEP, *supra* note 22, at 8-9. One indication that the comandantes were in control from the first is the report that an early governing junta voted to direct Nicaragua's UN representative to vote to condemn the Soviet invasion of Afghanistan, but that the Sandinista Party leadership simply ignored the junta and instructed the representative to abstain. See *Nicaragua: A Revolution Stumbles*, *ECONOMIST*, May 10, 1980, at 22.

<sup>25</sup> See COSEP, *supra* note 22, at 8-14. This study offers an instructive comparison between the original goals of the revolution against Somoza, as embodied in the National Unity Government Program of June 18, 1979, and the subsequent performance of the comandantes.

<sup>26</sup> See, e.g., Senator Chic Hecht (Nev.), *Grim record of Sandinista anti-Semitism*, *N.Y. Post*, June 4, 1985, at 1, cols. 1-7:

My desire to prevent the spread of anti-Semitism leads me to write about a government that so persecuted its Jewish population that the entire community was forced to flee the country it once called home. I speak not of Spain under the Inquisition, nor of Russia

sweeping restrictions on civil liberties announced on October 16, 1985,<sup>27</sup> but space does not permit their full discussion.<sup>28</sup> Although human rights abuses were legend under Somoza, by 1984 at least 120,000 Nicaraguans

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under the Czar, nor yet of Germany under the Nazis. I speak, rather, of Nicaragua under the Sandinistas. Most Americans—and even most Jews—remain unaware of the campaign of anti-Semitism that preceded the exodus of Nicaragua's Jewish community from that country. But from my position as a member of the Select Intelligence Committee of the U.S. Senate I have had a unique opportunity to learn of their experiences. And as an American and a Jew, I have a duty to do all in my power to tell their story so that what happened to Jews in Nicaragua will not happen to the thousands of other Jews who live elsewhere in Central America.

See also Anderson & Van Atta, *Flight from Nicaragua*, Wash. Post, Aug. 18, 1985, at B7, cols. 2-5.

The Department of State reported in 1983 as follows:

The 1978-79 insurrection and Government policies since 1979 led virtually all of the approximately 50 members of the Jewish community to leave the country. According to a report from a member of the Jewish community in Nicaragua, five Sandinista guerrillas attempted to set fire to the main door of the Managua synagogue in 1978. Since 1979, the government has expropriated the Managua synagogue and the property of many prominent Jews. . . . Prominent Jewish organizations such as the Anti-Defamation League of the B'nai B'rith charged in 1983 that the Nicaraguan Government was guilty of anti-Semitism.

DEP'T OF STATE, 98TH CONG., 2D SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1983, at 643 (Comm. Print 1984). See also SANDINISTAS AND MIDDLE EASTERN RADICALS, *supra* note 8. "The Sandinistas claim that they are not anti-Semitic, that Nicaragua's Jews had a 'bourgeois mentality' which prevented them from adjusting to a socialist revolution." *Id.* at 17 n.32. But see Brickner, *The Walls Are Not Smeared with Anti-Semitic Graffiti*, Wash. Post, Sept. 21, 1985, at A21, cols. 1-4. Brickner is in error in denying that the State Department's 1983 country report, *supra*, "mentioned persecution of the Jewish community." For a brief response to Brickner, see Press, *Sandinistas and Anti-Semitism*, Wash. Post, Oct. 5, 1985, at A17, col. 1.

<sup>27</sup> See discussion in text at note 327 *infra*.

<sup>28</sup> For further description of Sandinista human rights abuses and social and economic problems, see, e.g., COSEP, *supra* note 22; and the monthly human rights reports of the Permanent Commission on Human Rights of Nicaragua (CPDH) from June to November of 1984, *reprinted* in 131 CONG. REC. S1558 (daily ed. Feb. 20, 1985). But see AMERICAS WATCH, HUMAN RIGHTS IN NICARAGUA: REAGAN, RHETORIC AND REALITY (1985).

In the judgment of this observer, the Americas Watch effort is itself not free of the political bias it charges the administration with in human rights reporting. Human rights organizations serve a valuable function in disseminating hard-hitting (but sometimes overly zealous) exposés of suspect governmental activity. Americas Watch seems to apply this standard in its reporting on El Salvador and the contras but not on Nicaragua and the FMLN. Paradoxically, this low-keyed reporting and propensity to overlook serious Nicaraguan and FMLN violations, and even to defend the Sandinista human rights record, may encourage more abuses. That the Sandinistas regard Americas Watch as largely supportive is suggested by a recent interview with Mateo Guerrero, former executive director of the Nicaraguan National Commission for the Promotion and Protection of Human Rights (CNPPDH). Guerrero said he was instructed in April 1984 by Alejandro Bendana, the Secretary General of the Foreign Ministry, who was responsible for monitoring the CNPPDH,

to take charge of a visit by Juan Mendez of Americas Watch, a human rights organization based in the United States which had written favorably about the Nicaraguan government's human rights record. The CNPPDH was ordered to assist Mendez, providing him with a car and arranging his interviews with government entities such as the Supreme Court, the Ministry of Justice and the People's Anti-Somocista Tribunals.



who stayed under Somoza had fled the Sandinista revolution. A former American ambassador to the region has estimated that 10 percent or more of the population may have left the country.<sup>29</sup>

The Sandinistas have also violated their pledge of nonalignment. Prior to the takeover of power in Nicaragua, on March 6, 1978, the Democratic Front for the Liberation of Palestine and the FSLN issued a joint statement from Havana declaring war against "yankee imperialism, the racist regime of Israel" and the Nicaraguan Government.<sup>30</sup> As we have seen, the Sandinistas' foreign advisers and teachers have been selectively chosen from Cuba, the Soviet bloc and other radical states. The rapid Cuban- and Soviet-assisted military buildup and early secret military assistance agreements with Soviet-bloc sources reflect this alignment. In July 1980, Yasir Arafat made a "state visit" to Nicaragua to formalize full diplomatic ties between the Palestine Liberation Organization (PLO) and the Sandinista regime.<sup>31</sup> The recent trip to Moscow by Daniel Ortega that so embarrassed some members of the U.S. Congress was actually his fifth; his first was made within 9 months of taking power and he went to Cuba only weeks after the takeover. Recently, Daniel and Humberto Ortega have also paid official and state visits to North Korea. The Sandinista regime has been so well integrated into the Soviet orbit that on October 23-25, 1985, representatives from nine nations of the Soviet and Eastern bloc Council for Mutual Economic Assistance, to which Cuba also belongs, held a conference in Managua.

In the United Nations, the Sandinista voting record has been thoroughly aligned with that of the Soviet bloc. For example, in the 38th session of the General Assembly (1983-1984), the Sandinistas voted for a unified Soviet-Cuban position 96 percent of the time. They approved of the Vietnamese

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Office of Public Diplomacy for Latin America and the Caribbean, Dep't of State, Inside the Sandinista Regime: Revelations by the Executive Director of the Government's Human Rights Commission 2-3 (1985) [hereinafter cited as *Inside Sandinista Regime*].

According to a prominent Nicaraguan defector, the Inter-American Human Rights Commission and the nongovernmental Nicaraguan Permanent Commission on Human Rights placed repeated pressure on the Nicaraguan Government to provide information on human rights charges. *Americas Watch*, however, was apparently not perceived by the Government as providing comparable effective pressure on human rights matters. See *Information Supplied by Alvaro Baldizon Aviles*, at 1, 7 (unpublished paper on file at the Center for Law and National Security, 1985). See also Wright, *US Backs Nicaraguan Visitor and His Message*, *Minneapolis Star & Tribune*, Oct. 17, 1985, at 4A, 6A, col. 5.

Sandinista human rights violations will be discussed further in part IV, "Human Rights and the War of Misinformation."

<sup>29</sup> This is a recent estimate made in the author's presence by former U.S. Ambassador to Honduras John Negroponte, who is now Assistant Secretary of State for Oceans, Environment and Science.

The parallel with Cuban emigration is striking. Since Castro came to power in 1959, over one million Cubans, or almost 10% of the population, have fled, many to the United States. Silva notes that "Nicaraguan refugee children now outnumber refugee children of all other nationalities in [the Dade County, Florida] school system except Cubans." H. SILVA, *THE CHILDREN OF MARIEL* 50 (1985).

<sup>30</sup> SANDINISTAS AND THE MIDDLE EASTERN RADICALS, *supra* note 8, at 6.

<sup>31</sup> *Id.* at 17.

invasion of Kampuchea, supported action on an amendment to oust Israel and have repeatedly refused to condemn the Soviet invasion of Afghanistan while using the debates on Afghanistan as an occasion for vehemently attacking the United States and Israel.<sup>32</sup> Among Latin American states, Cuba and Nicaragua have consistently demonstrated a pattern of voting that is hostile to the West in general and the United States in particular. During the 39th session of the General Assembly, Cuba and Nicaragua were the two most hostile states in the Americas, as measured by lack of coincidence with U.S. votes; respectively, they agreed with the United States on only 4.1 percent and 6.8 percent of the votes. They also were the *only* states in the Americas to vote to reject Israel's credentials in the General Assembly. On Afghanistan, Cuba was the only American state to vote with the Soviet Union against the withdrawal of foreign troops, and Nicaragua, in abstaining on this vote, was the only other state in the Americas either to vote against or to abstain on this resolution. With respect to the proposal to require the withdrawal of Vietnamese troops from Kampuchea, only Cuba, Guyana and Nicaragua in the Americas voted with the Soviet bloc against the resolution.

On the ten votes judged by the U.S. Mission to the United Nations as the most significant in affecting U.S. interests during the 1984 session of the General Assembly, Nicaragua had a perfect record of opposition to all. Indeed, Nicaragua's voting record was so hostile to the West that it was considerably more so than the voting records of all the Warsaw Pact countries; and of all Eastern European countries, only Albania had a more consistently anti-Western record.<sup>33</sup>

Moreover, the comandantes' rhetoric is even more revealing than their voting record. Sandinista Army Commander in Chief Humberto Ortega told his officers in August of 1981: "We are anti-Yankee, we are against the bourgeoisie, we are guided by the Marxist-Leninist scientific doctrine of the Revolution."<sup>34</sup> Comandante Tomás Borge told a North Korean audience in June 1980—while the Sandinistas were still receiving massive United States economic assistance—that "the Nicaraguan revolutionaries will not be content until the imperialists have been overthrown in all parts of the world. . . . We stand with the . . . socialist countries."<sup>35</sup>

Several incidents illustrate the strong Soviet-bloc alignment of the comandantes. In March 1980, while on an official visit to Moscow, four top FSLN leaders signed a joint communiqué with their Soviet hosts which, among other things, attacked the NATO decision to deploy medium-range nuclear missiles in Europe and condemned the "mounting international ten-

<sup>32</sup> See Comandante Daniel Ortega's statement abstaining on a resolution condemning the Soviet invasion of Afghanistan; in its 25 paragraphs Ortega repeatedly attacks the United States and Israel, but in only one paragraph does he even mention Afghanistan. UN Doc. A/38/PV.7, at 26 (1983).

<sup>33</sup> See generally DEP'T OF STATE, REPORT TO CONGRESS ON THE VOTING PRACTICES IN THE UNITED NATIONS (1985).

<sup>34</sup> See COSEP, *supra* note 22, at 42–43.

<sup>35</sup> Pyongyang, KCNA in English, 0400 GMT, June 10, 1980, FOREIGN BROADCAST INFORMATION SERVICE [hereinafter cited as FBIS], NORTH KOREA, at D16 (June 12, 1980).

sion in connection with the events in Afghanistan, which has been launched by the imperialist and reactionary forces aimed at subverting the inalienable right of the people of the Democratic Republic of Afghanistan and of other peoples . . . to follow a path of progressive transformation."<sup>36</sup> On December 23, 1981, *La Prensa* reported that the FSLN Department of Propaganda and Political Education had ordered its communication media "to reflect from an objective viewpoint the difficult situation confronted by the Polish revolutionary movement, and to publish only those facts that have been confirmed by TASS [the official news agency of the Soviet Union] and by the Cuban Prensa Latina News Service." In January 1982, delegates from the Polish labor movement Solidarity who were touring Latin America were denied permission to enter Nicaragua.<sup>37</sup>

Sandinista rhetoric has also insulted Latin Americans. On October 11, 1985, Ecuador broke diplomatic and consular relations with Nicaragua. In announcing the break, Ecuador's Foreign Minister Edgar Terán said that Comandante Daniel Ortega had made "gross, inadmissible attacks on the dignity, sovereignty and independence" of Ecuador.<sup>38</sup> Apparently underlying the rupture was the discovery that the comandantes had assisted terrorists in a notorious attack in Ecuador.

The Soviet tilt in Nicaraguan foreign policy—as opposed even to a "socialist nations" tilt—has been so pronounced that, as in Grenada before them, the Sandinistas shortly after taking power recognized Taiwan rather than the People's Republic of China,<sup>39</sup> and they have sided with Vietnam in its conflict with the PRC while refusing to condemn Vietnam's invasion of Kampuchea.<sup>40</sup>

*The Military Buildup.* The massive and secret military buildup began even as the United States poured in economic assistance. Before there was any contra threat, the Nicaraguan armed forces had been built up to nearly six times the size of the Somoza National Guard. Today they are nine times that level and still escalating. They now have some 350 tanks and armored vehicles, compared with 3 tanks and 25 antiquated armored cars under Somoza, none in Costa Rica, 16 armored reconnaissance vehicles in Honduras and less than 30 armored personnel carriers in El Salvador—a nation faced with a substantial guerrilla insurgency. A major airfield capable of accommodating the largest aircraft in the Soviet arsenal is being built at Punta Huete, and Nicaraguan pilots are being trained in Bulgaria to fly Soviet-built MiGs.<sup>41</sup> Weapons introduced by the Soviets into Nicaragua in-

<sup>36</sup> Kirkpatrick, *supra* note 13, at 349.

<sup>37</sup> See COSEP, *supra* note 22, at 41 and 65 n.4. For other examples of the FSLN's close alignment with the Soviet bloc, see *id.* at 42–43.

<sup>38</sup> Baltimore Sun, Oct. 13, 1985, at 4, col. 5.

<sup>39</sup> See Cruz, *The Origins of Sandinista Foreign Policy*, in CENTRAL AMERICA: ANATOMY OF CONFLICT 95, 99 (R. Leiken ed. 1984). This recognition pattern has recently been reversed.

<sup>40</sup> *Id.* See also Rosenberg, *The Soviets and Central America*, in *id.* at 131; Leiken, *The Salvadoran Left*, in *id.* at 111. In a UN speech on Sept. 28, 1979, Comandante Daniel Ortega said: "Chinese troops have attacked Vietnam. But the spirit of the Vietnamese people has been stronger than the murderous instincts of the . . . Chinese divisions. . . ." COSEP, *supra* note 22, at 40.

<sup>41</sup> See generally DEP'T OF STATE & DEP'T OF DEFENSE, BACKGROUND PAPER: NICARAGUA'S

clude: the world's fastest, best armed helicopter, the MI-24/Hind D; 120 T-55 medium tanks (for years the Warsaw Pact's main battle tank); nearly 30 PT-76 light amphibious tanks with river-crossing capability; a few BRDM-2RHK chemical reconnaissance vehicles and ARS-14 decontamination trucks;<sup>42</sup> and other state-of-the-art military equipment.

This Sandinista military buildup is unprecedented in Central America and, with the exception of the Honduran Air Force, its result far outclasses the small armed forces of Nicaragua's neighbors. It was begun as a deliberate policy well before any contra threat was evident, that is, in 1980, 2 years before there was any significant armed opposition to the regime.<sup>43</sup> In 1980 a first group of Nicaraguans was sent to Eastern Europe for flight training in MiGs.<sup>44</sup> In February 1981, the Sandinistas announced that they would build a 200,000-man militia, but, as the *New York Times* pointed out, they faced "surprisingly little counter-revolutionary activity" at that time.<sup>45</sup>

The militarization of Nicaraguan society produced by this buildup is similar to that in Cuba. On a per capita basis, Nicaragua now commands a much greater military than any other nation in the region except Cuba. On an absolute basis, it now has the third largest army in Latin America after only Brazil and Cuba.<sup>46</sup> A draft has been introduced for the first time in Nicaraguan history, and schoolbooks teach arithmetic through exercises illustrated with grenades and Soviet AK-47 assault rifles.<sup>47</sup> This militarization of Nicaraguan education seems inconsistent with Article 3(1) of the revised Charter of the OAS, which provides: "The education of peoples should be directed toward justice, freedom and peace."

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MILITARY BUILD-UP AND SUPPORT FOR CENTRAL AMERICAN SUBVERSION (1984) [hereinafter cited as NICARAGUA'S MILITARY BUILD-UP]. See also DEP'T OF DEFENSE, SOVIET MILITARY POWER 19-23 (1985).

<sup>42</sup> Nicaragua's acquisition of Soviet chemical warfare vehicles is particularly alarming in view of the recent *Washington Post* report that the Soviets may have transferred offensive chemical warfare capability to Egypt (during the 1960s while Egypt was a major Soviet client in the Middle East), Syria, Ethiopia and Vietnam, and persistent reports of use by the Soviets and client states of chemical and toxin weapons in Afghanistan, Laos and Kampuchea. See Oberdorfer, *Chemical Arms Curbs Are Sought*, Wash. Post, Sept. 9, 1985, at A7, cols. 3-4. See also Report and Recommendations to the ABA House of Delegates submitted jointly by the Standing Committee on Law and National Security and the Section of International Law and Practice (July 1985) (on the use of chemical and toxin weapons in Kampuchea, Laos and Afghanistan).

<sup>43</sup> See SOVIET-CUBAN CONNECTION, *supra* note 14, at 2.

<sup>44</sup> See SOVIET MILITARY POWER, *supra* note 41, at 121.

<sup>45</sup> N.Y. Times, Feb. 20, 1981, at A2, col. 3.

<sup>46</sup> In 1977 Nicaragua had an active-duty army of about 7,100—roughly the size of the Salvadoran Army, and half the size of the Guatemalan and Honduran Armies. By 1984, under the Sandinistas, Nicaragua had by far the largest army in Central America with roughly 62,000 active-duty forces, compared with El Salvador at 41,150, Guatemala at 40,000, Honduras at 17,200 and Costa Rica at zero. See SOVIET-CUBAN CONNECTION, *supra* note 14, at 26. A recent Gallup poll finds that large majorities in Honduras and Costa Rica feel that the Sandinista buildup is a military threat and destabilizes their governments. *Id.*

<sup>47</sup> On the militarization of Nicaraguan education, see Dorn & Cuadra, *Schoolbooks, Sandinista-Style: Let's See—If You Divide 6 Marxist-Leninists by 3 Grenades*, Wash. Post, Aug. 18, 1985, at B5, cols. 4-6.

*The Secret War.* The comandantes came to power with substantial Cuban assistance—although they also rode in on a U.S. cutoff of military assistance to Somoza, a wave of popular sentiment in Nicaragua against Somoza and OAS- and U.S.-assisted international isolation of the Somoza regime.<sup>48</sup> The joint statement of goals of the FSLN published in 1969, a decade before it took power, stated its support for “[a] struggle for a ‘true union of the Central American peoples within one country’, beginning with support for national liberation movements in neighboring states.”<sup>49</sup> Consistent with this statement, the comandantes elected as one of their first orders of business to join their patron, Cuba, in supporting “revolutionary internationalism” in the Central American region. The most serious attacks in the Cuban-Nicaraguan secret war against neighboring states have been directed against El Salvador and Guatemala, although Honduras and, to a lesser extent, Costa Rica have been targets of smaller scale subversion, terrorism and efforts at destabilization.

It should be understood in appraising the armed attacks by Cuba and Nicaragua on their neighbors that these attacks are intended by their perpetrators to be secret and nonattributable to either country. To that end, they have consistently employed all the mechanisms available to a modern and sophisticated intelligence network to conceal the nature of the attacks. And that network—emanating from totalitarian regimes—has not been subject to scrutiny by the national media or other democratic checks.

Before 1980, the Salvadoran guerrillas were few, disorganized and feuding, and were armed only with pistols, hunting rifles and shotguns purchased largely on the world market.<sup>50</sup> In December 1979 and May 1980, Fidel Castro hosted meetings in Havana to organize competing Salvadoran insurgent factions into a Unified Revolutionary Directorate (DRU) controlled by Moscow-oriented Marxist-Leninists. In late 1980, the Farabundo Martí National Liberation Front (FMLN) was formed as the coordinating body of the guerrilla organizations and a front organization, the Revolutionary Democratic Front (FDR), was created to attract international political support. As part of the effort at world deception, three small non-Marxist-Leninist political parties were brought into the front but were not given representation in the DRU, which effectively controls the military insurgency. As earlier in Nicaragua<sup>51</sup> and subsequently in Guatemala, Castro insisted on a unified guerrilla command controlled by a “vanguard” Marxist-Leninist group as a precondition for substantial assistance. At the Havana meetings, at least two sessions were held with the secret Cuban Directorate of Special Operations to review guerrilla military plans. In April 1980, a meeting was held at the Hungarian Embassy in Mexico City between guerrilla leaders and representatives of the German Democratic Republic, Bulgaria, Poland,

<sup>48</sup> See generally D. NOLAN, *supra* note 8.

<sup>49</sup> *Id.* at 37.

<sup>50</sup> See DEP'T OF STATE, SPECIAL REP. NO. 80, COMMUNIST INTERFERENCE IN EL SALVADOR 2 (1981) [hereinafter cited as COMMUNIST INTERFERENCE].

<sup>51</sup> Nolan writes of the process of unification in the Nicaraguan revolution: “Shadowy negotiations continued, with Cuban leader Fidel Castro playing a key role. Vanguard unification was Castro's main condition for providing the Sandinistas with their first significant amount of material Cuban aid.” D. NOLAN, *supra* note 8, at 97.

Vietnam, Hungary, Cuba and the Soviet Union. Following the May 1980 Havana meeting, Shafik Handal, the leader of the Salvadoran Communist Party, left for an extensive trip to the Soviet Union, Vietnam, East Germany, Czechoslovakia, Bulgaria, Hungary and Ethiopia in order to obtain arms and support for the insurgency.<sup>52</sup> In response, large quantities of arms were transshipped via Cuba and Nicaragua. To conceal the origin of these weapons, captured U.S. weapons from stocks in Vietnam and Ethiopia were used. Initial shipments totaled more than 700 tons.

While Shafik Handal was seeking arms from Soviet-bloc countries, the other Salvadoran guerrilla leaders at the May Havana meeting left for Managua and talks with the Sandinistas. During this meeting in early June, the DRU leaders discussed the creation of a headquarters complex in Nicaragua with "all measures of security," material support from the Sandinistas and international support by the Sandinistas for FMLN operations. In July representatives of the DRU met with the Sandinistas in Managua to iron out details and arrange for an exchange of Soviet-bloc weapons for Western-manufactured arms to assist in concealing the secret attack. Both meetings included conferences with high-level comandantes. On July 27, the guerrillas' general staff left Managua for Havana where the military plans were completed.

From approximately September or October 1980, large shipments of arms and equipment began flowing to the FMLN through Cuba and Nicaragua. Huge quantities of arms and ammunition were "surged in" during this period, so rapidly in fact that guerrilla leaders complained to Managua that they could not absorb them. Apparently, Fidel Castro and Nicaraguan advisers were worried that only a short time for a military overthrow on Nicaraguan lines remained before the newly elected American President Ronald Reagan took office. It was these huge shipments beginning about September 1980 that convinced the Carter administration to protest to Managua—in response, Managua suspended the shipments for one month—and ultimately to resume military assistance to El Salvador and suspend economic assistance to Managua.

As a result of the FMLN-comandante talks the previous June and July, a military headquarters complex was provided to the FMLN insurgents outside Managua with Cuban and Nicaraguan military assistance. From this command and control center, orders were radioed to FMLN forces operating in El Salvador on a daily basis. The Nicaraguans also embarked on a major logistics effort to transport the arms, ammunition and supplies flowing in via Cuba: trucks and other vehicles were modified to transfer concealed arms overland and naval and air supply was organized. The comandantes controlled the warehouses where these FMLN supplies were stored. On December 15, 1980, the revolutionary radio station Radio Liberación began broadcasting from Nicaragua on behalf of the FMLN. In addition, the comandantes serve as the principal focal point for financing the FMLN rebels and transshipping currency to them.<sup>53</sup>

Since mid-1980 the Sandinistas have played an important role in training

<sup>52</sup> For details, see *id.* at 4–5.

<sup>53</sup> See generally *id.* at 4–7.

FMLN insurgents. There are at least four training camps in Nicaragua used extensively for this purpose and at any one time several hundred guerrillas may be involved. These camps include Ostional in the southern province of Rivas, a former National Guard camp in northwestern Nicaragua close to the River Tamarindo, Tamagas outside Managua, and a new camp that opened in 1984 near Santa Julia on the Consiguina Peninsula. Salvadoran insurgents have also been trained in guerrilla warfare and sabotage at camps in Cuba.<sup>54</sup>

The January 1981 FMLN "final offensive" in El Salvador did not succeed. A principal factor is that in El Salvador the FMLN, unlike the insurgents against Somoza, has never been able to generate significant popular support. In contrast to Nicaragua, El Salvador had already had a reformist revolution in 1979. Although severe polarization and violence on the far left and far right were endemic, there was no "Somoza." The subsequent free and democratic elections in 1983 and 1984, culminating in President Duarte's strongly reformist and democratic leadership, dealt a severe political blow to the FMLN—which, lacking popular support, has consistently refused to participate in elections.<sup>55</sup>

Despite the political setbacks, Cuban and Nicaraguan support for the secret war against El Salvador has continued. Beginning in 1982–1983, shipments of arms seem to have been reduced, as opposed to the continuing shipments of ammunition and explosives, and the continuing training, command and control, financing and other indices of the secret attack. The reasons for this apparent reduction, but not cessation, in arms shipments include, as we have seen, that the insurgents obtained a surplus of arms and have stockpiled weapons as a result of the previous "surge" shipments; also, the number of FMLN guerrillas has declined from a peak of about nine thousand in 1982 to approximately six to seven thousand today. Moreover, the comandantes have adopted a lower profile during their pending case before the World Court and repeated close congressional votes on assistance to the contras. Finally, contra attacks in Nicaragua are disrupting shipments and requiring the Sandinistas to turn their attention inward.<sup>56</sup>

At roughly the same time, a major secret war has also been conducted against Guatemala, with the active participation and support of the comandantes as well as Cuba. In April and July 1981, Guatemalan security forces captured large quantities of insurgent arms, again largely traceable to U.S. stocks captured in Vietnam.<sup>57</sup> Today, however, following the Con-

<sup>54</sup> See generally Kramer, *The Not-Quite War*, NEW YORK, Sept. 12, 1983, at 41. See also N.Y. Times, Apr. 20, 1959, at 1; DeYoung, *Another Cuba Under Sandinistas?*, Wash. Post, July 24, 1979, at 1.

<sup>55</sup> See Kramer, *supra* note 54, at 41.

<sup>56</sup> This reduction in arms shipments seems to be the kernel of truth in the partial picture presented by David MacMichael, a former low-level CIA contract employee who has been providing testimony on behalf of Nicaragua before the International Court of Justice, and those seeking to deny the Cuban-Nicaraguan secret attacks on neighboring states. See Wash. Post, Sept. 8, 1985, at A17, cols. 1–5.

<sup>57</sup> Dep't of State, *Cuban and Nicaraguan Support for the Salvadoran Insurgency* 5 (1982).

tadora talks and contra operations in Nicaragua, the ongoing attack against Guatemala seems to be run primarily from Cuba.<sup>58</sup>

There have also been attacks on Honduras involving insurgent groups trained in Cuba and Nicaragua and, to a lesser extent, terrorist attacks and subversive efforts against Costa Rica.<sup>59</sup> Since early 1981, Nicaragua and Cuba have sought to build an insurgent infrastructure in Honduras by recruiting Hondurans for training in the two countries and infiltrating the recruits back into Honduras as armed insurgents. In two major incidents, the Olancho infiltration of July 1983 and the Paraíso infiltration of July 1984, separate groups of 96 and 19 guerrilla recruits trained in Cuba and Nicaragua were captured by Honduran authorities as a result of defections by returning members of the two groups.<sup>60</sup> These attacks and subversive efforts against Honduras are continuing. In April 1985, seven agents of the Nicaraguan DGSE were apprehended in Honduras. They admitted having come from Nicaragua to assist Honduran insurgents.<sup>61</sup>

Despite Costa Rica's strong tradition of democratic and socially conscious government, as early as 1970 the Sandinista FSLN considered part of its "fundamental mission . . . to aid the revolutionary movements in all of Central America, including bourgeois democratic Costa Rica."<sup>62</sup> After taking power in Nicaragua, the FSLN began to make good on its self-imposed mission by sponsoring a recurrent pattern of terrorism in Costa Rica and planning a broader destabilization of Costa Rica through guerrilla insurrection. For example, in January 1982, Costa Rican authorities arrested Salvadoran and Guatemalan terrorists engaged in an effort to kidnap Salvadoran businessman Roberto Palomo. During their trial in 1983, the terrorists testified that they had received logistical support from Nicaragua and military and ideological training there. Similarly, when Costa Rican authorities arrested Germán Pinzón Zora, a member of the Colombian M-19 terrorist group, for the July 3, 1982 bombing of the San José office of the Honduran national airlines, he implicated three Sandinista diplomats in the Nicaraguan Embassy as having directed and assisted in the attack. He also said that the attack was part of a broader Nicaraguan plan of terrorism to discredit Costa Rica internationally.<sup>63</sup> Former Sandinista intelligence officer Miguel Bolaños Hunter reported in June 1983:

Since 1979 there has been a plan to neutralize democracy in Costa Rica. They are doing it covertly in Costa Rica. They are training guerrilla groups and infiltrating unions to cause agitation. The idea is to cause clashes with the police and Costa Rican soldiers to cause a break

<sup>58</sup> See Federico Fahsen, Ambassador of Guatemala, Address at Symposium on Soviet Involvement in Central America at Georgetown University (Sept. 10, 1984).

<sup>59</sup> See generally DEP'T OF STATE & DEP'T OF DEFENSE, BACKGROUND PAPER: CENTRAL AMERICA 12-13 (1983) [hereinafter cited as CENTRAL AMERICA].

<sup>60</sup> See generally Jenkins, *Honduran Army Defeats Cuban-Trained Rebel Unit*, Wash. Post, Nov. 22, 1983, at A1, cols. 2-3.

<sup>61</sup> See Dep't of State, *Economic Sanctions against Nicaragua* 1 (1985).

<sup>62</sup> D. NOLAN, *supra* note 8, at 38-39.

<sup>63</sup> See CENTRAL AMERICA, *supra* note 59, at 13.



between the unions and the president. When the economy gets worse they will be able to have an organized popular force aided by the guerrilla forces already there.<sup>64</sup>

Nicaraguan subversion against Costa Rica is continuing. After nearly a hundred incidents resulting in diplomatic protests, on February 19, 1985, Costa Rica ordered Nicaragua to reduce its embassy personnel from 47 to 10.

Costa Rica's Special Legislative Commission has investigated and documented the clandestine Cuban network set up in Costa Rica to support Sandinista operations against Somoza. According to the commission, after the fall of Somoza the network was reoriented to provide clandestine arms shipments to the FMLN insurgents in El Salvador.<sup>65</sup>

In short, since mid-1980 Cuba and Nicaragua have been waging a secret war against neighboring Central American states, particularly El Salvador. The attack on El Salvador is neither temporary nor small-time. It fields forces roughly one-sixth the size of the Salvadoran Army and has resulted in thousands of war casualties and over a billion dollars in direct war damage to the Salvadoran economy. Although their figures are likely to be inflated, the FMLN insurgents claim that they have inflicted more than 18,000 casualties on the Salvadoran armed forces to date, and that in the first half of 1985 they continued to kill Salvadorans at a rate of 400 per week.<sup>66</sup> Cuban and Nicaraguan involvement in this serious attack includes: participation in organizing the effective insurgency; the provision of arms; the laundering of Soviet-bloc for Western arms; transshipment of arms and assistance in covert transport; assistance in military planning; financing; ammunition and explosives supply; logistics assistance; the provision of secure command and control facilities; the training of insurgents; communications assistance; intelligence and code assistance; political, propaganda and international support; and the use of Nicaraguan territory as sanctuary for attack. With the exception of some reduction in arms transport since 1982-1983, these activities are continuing today in a serious effort to overthrow the democratically elected Government of El Salvador.

The evidence of this secret attack comes from many sources, which include highly classified intelligence reviewed by both the Carter and the Reagan administrations; conclusions of the Senate and House intelligence committees after careful review of the intelligence data; conclusions of the bipartisan Kissinger Commission after careful review of the entire record and extensive inquiry in the region; statements and reports of Central American leaders and nations; reports by independent media and scholars; public statements by defectors; publicly available Cuban, Nicaraguan and FMLN positions (though to a lesser extent, for obvious reasons); and, most ironically, testimony of witnesses for Nicaragua in its pending case before the World Court.

<sup>64</sup> *Inside Communist Nicaragua: The Miguel Bolaños Hunter Transcripts*, HERITAGE FOUNDATION BACKGROUNDER, No. 294, Sept. 30, 1983, at 12 [hereinafter cited as *Bolaños Transcripts*].

<sup>65</sup> CUBA'S RENEWED SUPPORT FOR VIOLENCE, *supra* note 10, at 8.

<sup>66</sup> Address by Comandante Fermán Cienfuegos, FBIS, CENTRAL AMERICA, at Q11 (Aug. 5, 1985).

It should be emphasized that both the Carter and the Reagan administrations, after review of the intelligence data and publicly available evidence, concluded that Cuba and Nicaragua were engaged in a secret attack against El Salvador. The U.S. Departments of State and Defense have issued numerous detailed reports on the Cuban and Nicaraguan involvement that document repeated interception of arms and ammunition shipments. These reports, among others, were released in February 1981, March 1982, May 1983, July 1984 and April 1985.<sup>67</sup> The most recent and detailed report was issued by the Department of State in September 1985.<sup>68</sup> Readers are invited to review these reports and to draw their own conclusions.<sup>69</sup>

Some of the relevant congressional findings appear in a report of the House Permanent Select Committee on Intelligence, dated May 13, 1983, which stated:

The insurgents are well-trained, well-equipped with modern weapons and supplies and rely on the sites in Nicaragua for command and control and for logistical support. The intelligence supporting these judgments provided to the committee is convincing. There is further evidence that the Sandinista government of Nicaragua is helping train insurgents and is transferring arms and financial support from and through Nicaragua to the insurgents. They are further providing the insurgents bases of operations in Nicaragua. Cuban involvement, especially in providing arms, is also evident.<sup>70</sup>

These findings were made by a committee with a Democratic majority that has been critical of the administration's policy in Central America and that has no incentive to arrive at such findings. Moreover, Congress as a whole found in the Intelligence Authorization Act of 1984: "By providing military support, including arms, training, logistical command and control and communication facilities, to groups seeking to overthrow the government of El

<sup>67</sup> They are, respectively, COMMUNIST INTERFERENCE, *supra* note 50; BUREAU OF PUBLIC AFFAIRS, DEP'T OF STATE, CURRENT POLICY NO. 376, CUBAN SUPPORT FOR TERRORISM AND INSURGENCY IN THE WESTERN HEMISPHERE (1982); CENTRAL AMERICA, *supra* note 59; NICARAGUA'S MILITARY BUILD-UP, *supra* note 41; and SOVIET-CUBAN CONNECTION, *supra* note 14.

<sup>68</sup> DEP'T OF STATE, REVOLUTION BEYOND OUR BORDERS: SANDINISTA INTERVENTION IN CENTRAL AMERICA (1985) [hereinafter cited as REVOLUTION BEYOND OUR BORDERS].

On Dec. 7, a car ferrying ammunition, explosives, funds, and cryptographic and other support materials to the insurgents in El Salvador from Nicaragua was intercepted after an accident in Honduras. The driver, who was trained in Cuba, admitted having made a similar delivery from Nicaragua to the FMLN earlier this year. This was the latest "smoking gun" in a continuing series of interceptions of shipments from Nicaragua to the FMLN. Wash. Post, Dec. 20, 1985, at A49, cols. 3-6.

<sup>69</sup> It is fashionable—and, for some, part of a serious disinformation effort—to attack State Department "white papers." Such attacks have been made both on the Vietnam-era white papers and on some Central American white papers. Western scholarship and statements by North Vietnamese leaders involved have now confirmed that reports in the white papers on the attack from North Vietnam were, if anything, understatements. For subsequent scholarly conclusions on the nature of that attack, see, e.g., S. KARNOW, VIETNAM: A HISTORY (1983).

<sup>70</sup> H.R. REP. NO. 122, 98th Cong., 1st Sess. 5 (1983). The committee also considered, on the basis of the available intelligence, that "[a] major portion of the arms and other material sent by Cuba and other communist countries to the Salvadoran insurgents transits Nicaragua with the permission and assistance of the Sandinistas." *Id.* at 6.

Salvador and other Central American governments, the Government of National Reconstruction of Nicaragua has violated Article 18 of the Charter of the Organization of American States."<sup>71</sup>

Corollary evidence that the Sandinista attack against El Salvador continues to be serious was reported in March 1984 by Democratic Senator Daniel P. Moynihan, then Vice-Chairman of the Senate Select Committee on Intelligence:

It is the judgment of the Intelligence Committee that Nicaragua's involvement in the affairs of El Salvador and, to a lesser degree, its other neighbors, continues. As such, our duty, or at the very least our right, now as it was [last November,] is to respond to these violations of international law and uphold the Charter of the OAS. . . .

In sum, the Sandinista support for the insurgency in El Salvador has not appreciatively lessened; nor, therefore, has their violation of the OAS Charter. . . .<sup>72</sup>

On August 2, 1984, the Democratic Chairman of the House Intelligence Committee, Congressman Boland, in a colloquy with Congressman Coleman, made clear for the record that Nicaragua was continuing to provide "military equipment," "communications, command and control," "logistics" and "other support activities" to the insurgents in El Salvador.<sup>73</sup>

The Kissinger Commission's report states that "[t]he guerrilla front [FMLN] has established a unified military command with headquarters near Managua"<sup>74</sup> and that the Sandinistas, together with the Cubans and the Soviets, have given major support to the Salvadoran insurgents.<sup>75</sup>

Central American leaders have reached similar conclusions. Thus, former Salvadoran President Alvaro Magaña told a Spanish newspaper on December 22, 1983 that "armed subversion has but one launching pad: Nicaragua. While Nicaragua draws the attention of the world by saying that for two years they have been on the verge of being invaded, they have not ceased for one instant to invade our country."<sup>76</sup> President Duarte said in a press conference in San Salvador on July 27, 1984:

[W]e have a problem of aggression by a nation called Nicaragua against El Salvador, that these gentlemen are sending in weapons, training people, transporting bullets and what not, and bringing all of that to El Salvador. I said that at this very minute they are using fishing boats as a disguise and are introducing weapons into El Salvador in boats at night.

<sup>71</sup> H.R. REP. NO. 569, 98th Cong., 1st Sess. 3 (1984). See also STATE-SPONSORED TERRORISM, *supra* note 2, at 66.

<sup>72</sup> Wash. Post, Apr. 10, 1984, at A20, col. 6.

<sup>73</sup> See 130 CONG. REC. H8268-69 (daily ed. Aug. 2, 1984).

<sup>74</sup> REPORT OF THE PRESIDENT'S NATIONAL BIPARTISAN COMMISSION ON CENTRAL AMERICA 116 (1984).

<sup>75</sup> *Id.* at 143-45.

<sup>76</sup> NICARAGUA'S MILITARY BUILD-UP, *supra* note 41, at 23.

In view of this situation, El Salvador must stop this somehow. The contras . . . are creating a sort of barrier that prevents the Nicaraguans from continuing to send arms to El Salvador by land.<sup>77</sup>

In April 1984, the Foreign Minister of Honduras told the UN Security Council that his "country is the object of aggression made manifest through a number of incidents by Nicaragua against our territorial integrity and civilian population."<sup>78</sup>

Similarly, the independent media and scholars have repeatedly reported evidence of the Cuban-Nicaraguan secret attack. For example, Alan Riding reported in the *New York Times* on March 18, 1982 that "the [Salvadoran] guerrillas acknowledge that, in the past, they received arms from Cuba through Nicaragua, as the Reagan Administration maintains."<sup>79</sup> On September 21, 1983, the *Washington Post* carried a major article describing how reporters admitted to Nicaragua by the Sandinistas to see a "fishing cooperative" instead found a base for ferrying arms to El Salvador.<sup>80</sup> On April 11, 1984, the *New York Times* reported from Managua: "Western European and Latin American diplomats here say the Nicaraguan Government is continuing to send military equipment to the Salvadoran insurgents and to operate training camps for them inside Nicaragua."<sup>81</sup> In a recent study, Stephen Hosmer and Thomas Wolfe wrote of the Central American conflict: "The

<sup>77</sup> FBIS, LATIN AMERICA 4 (July 30, 1984). President Duarte has repeatedly confirmed the Nicaraguan aggression against El Salvador. See generally Declaration of Intervention of the Republic of El Salvador, Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Aug. 15, 1984, reprinted in 24 ILM 38 (1985). See also Inaugural Address by President Duarte, June 1, 1984, FBIS, LATIN AMERICA 5-7 (June 4, 1984) ("with the aid of Marxist governments like Nicaragua, Cuba and the Soviet Union, an army has been trained and armed and has invaded our homeland. Its actions are directed from abroad"); and the speech by President Duarte in October 1985 to the UN General Assembly, Wash. Post, Oct. 26, 1985, at A28, cols. 1-2 ("The orders and communications came from Managua, and that was the center of operations. . .").

<sup>78</sup> UN Doc. S/PV.2529 (1984), reprinted in United States Counter-Memorial (Nicar. v. U.S.), Ann. 60 (submitted Aug. 17, 1984). See also statement of Ambassador Fahsen, *supra* note 58.

<sup>79</sup> Riding, *Salvador Rebels: Five-Sided Alliance Searching for New, Moderate Image*, N.Y. Times, Mar. 18, 1982, at A1, col. 3.

<sup>80</sup> Dillon, *Base for Ferrying Arms to El Salvador Found in Nicaragua*, Wash. Post, Sept. 21, 1983, at A29, col. 2.

<sup>81</sup> N.Y. Times, Apr. 11, 1984, at A1, col. 5. Even the U.S. newspaper articles selectively relied on by Nicaragua before the ICJ as its sole proof that it was not aiding the insurgency confirm its involvement. For example, although critical of the administration's claims in this regard, Doyle McManus wrote: "There is little doubt that Nicaragua has supplied at least some weapons, ammunition and other equipment to the Salvadoran leftists." He added that "[e]ven the House Intelligence Committee which opposes the CIA program has acknowledged that." McManus, *U.S. Fails to Offer Evidence of Nicaragua Arms Traffic*, Los Angeles Times, June 16, 1984, at 1, 18, cols. 1-2. According to Julia Preston, in September 1983, "reporters stumbled onto a Sandinista-run arms transshipment depot in northwestern Nicaragua . . . where ammunition was dispatched in canoes across the Gulf of Fonseca" into El Salvador. She also reported that during a visit to Washington in April 1984, "Nicaraguan Foreign Minister D'Escoto refused to deny in closed congressional meetings that his country is assisting the Salvadoran rebels. . . ." Preston, *Evidence of arms smuggling into Salvador lacking*, Boston Globe, June 10, 1984, at 1, 28, col. 5.

cooperation between members of the Soviet bloc and other radical regimes to aid the revolutionary forces in El Salvador . . . is an example of a coordinated communist effort to bring about the overthrow of an established government."<sup>82</sup>

Publicly available reports by defectors have further confirmed the Cuban-Nicaraguan involvement, such as an interview with the *Washington Post* and the Department of State given by Miguel Bolaños Hunter, a former member of the state security system of the Sandinista regime.<sup>83</sup> He also explained that

[t]he Sandinistas give total help, advice and direction on how to manage the war and internal politics. The guerrillas are trained in Managua, the Sandinistas help the air force, army and navy get arms through. Some arms come from Cuba via Nicaragua. They use the houses of Nicaraguan officers for safe houses and command posts. There is a heavy influx of communications giving orders. You can say the whole guerrilla effort is managed by Nicaragua.<sup>84</sup>

Alejandro Montenegro, former commander in chief of the National Central Guerrilla Front of the People's Revolutionary Army in El Salvador who led the major attack against Ilopango airport, also testified to the magnitude of Nicaragua's involvement.<sup>85</sup> He was reported as telling the *New York Times* "that virtually all of the arms received by the guerrilla units he led came from Nicaragua" and that "in 1981 and 1982 guerrilla units under his command in San Salvador and north of the city received '99.9 percent of [their] arms' from Nicaragua."<sup>86</sup> He said that the attack on the Ilopango airport was carried out by seven of his men who had returned from Nicaragua after 6 months of training in Cuba.<sup>87</sup> And he told a congressional group: "What I want to make very clear is that Managua is where the command center is in every regard."<sup>88</sup>

Similarly, M. López-Ariola, another former high-ranking Salvadoran insurgent, has related that representatives of the DRU from the five Salvadoran insurgent groups live in Managua and each group has a command center there. Alvaro Baldizón Aviles, the former chief investigator of the Interior

<sup>82</sup> S. HOSMER & T. WOLFE, *supra* note 2, at 102-03. See also McGeorge, *Tactics and Techniques of Terrorists and Saboteurs*, *TERRORISM: AN INTERNATIONAL JOURNAL*, No. 3, Winter 1985, at 297. Describing the attack on the Cuscatlán bridge in El Salvador, McGeorge writes: "This attack was not done by a group of bush-leaguers; it is an example of the use of foreign nationals or mercenaries. . . ." *Id.* at 301.

<sup>83</sup> See generally NICARAGUA'S MILITARY BUILD-UP, *supra* note 41, at 14-15.

<sup>84</sup> Bolaños *Transcripts*, *supra* note 64, at 10.

<sup>85</sup> See NICARAGUA'S MILITARY BUILD-UP, *supra* note 41, at 16-17.

<sup>86</sup> Smith, *A Former Salvadoran Rebel Chief Tells of Arms From Nicaragua*, *N.Y. Times*, July 12, 1984, at 10, cols. 2-6.

<sup>87</sup> See Dep't of State interview with Alejandro Montenegro, Division of Language Services, No. 112,533, at 19.

<sup>88</sup> H.R. Republican Study Committee, Republican Study Committee Task Force on Central America Briefing with Alejandro Montenegro, July 12, 1984, at 5. Montenegro also dated the arrival of the first shipment of arms from Havana via Nicaragua as Dec. 31, 1980. See Dep't of State interview, *supra* note 87, at 11.

Ministry's Special Investigation Committee, has recently reported the "training for guerrilla warfare" of groups of the Costa Rican Popular Vanguard Party at a site near El Castillo in southern Nicaragua. Apparently, each group would stay for 6 months of training by the Nicaraguans before returning to Costa Rica and would then be replaced by another group.<sup>89</sup> Most tellingly, Edén Pastora Gómez, perhaps the principal national hero of the Sandinista revolution, recently wrote: "When the Managua government, personified by the nine top Communists, was planning the insurrection in El Salvador, I was a participant in the meetings of the National leadership. . . ."<sup>90</sup>

Claims by the FMLN that it gets its weapons by capturing them from the Government of El Salvador do not square with the public record. Among other discrepancies, the following should be noted. When the insurgents launched their "general offensive" in January 1981, they did so with an impressive array of sophisticated weapons never before used in El Salvador by either the insurgents or the Salvadoran Army, including Belgian FAL rifles, German G-3 rifles, U.S. M-16 and AR-15 rifles, the Israeli Uzi sub-machine gun, the American M-60 machine gun and many other such weapons.<sup>91</sup> Serial number studies of captured FMLN weapons of American manufacture show that the great preponderance was sent to Vietnam, not El Salvador.<sup>92</sup> Moreover, the substantial losses of arms by the insurgents to the Salvadoran Army are not taken into account.<sup>93</sup> Finally, even if the rebels' exaggerated claims about the captured arms are accepted without considering their substantial losses or other factors, the quantity of their arms still cannot be explained.

The statements of the Sandinistas themselves are strongly suggestive of their secret war—even though they obviously recognize that an ongoing secret war cannot be directly and publicly confirmed. Thus, as we have seen, the FSLN statement of goals called for "support for national liberation movements in neighboring states" for at least a decade before the Sandinistas came to power. More recently, El Salvador informed the International Court of Justice that "Foreign Minister Miguel D'Escoto, when pressed at a meeting of the Foreign Ministers of the Contadora Group in July 1983, . . . on the issue of Nicaraguan materiel support for the subversion in El Salvador, shamelessly and openly admitted such support in front of his colleagues of the Contadora Group."<sup>94</sup>

<sup>89</sup> Information Supplied by Alvaro Baldizon Aviles, *supra* note 28, at 19–21.

<sup>90</sup> Pastora, *Nicaragua 1983–1985: Two Years' Struggle against Soviet Intervention*, 8 J. CONTEMP. STUD. 5, 9–10 (1985).

<sup>91</sup> See COMMUNIST INTERFERENCE, *supra* note 50, at 2.

<sup>92</sup> See, e.g., SOVIET-CUBAN CONNECTION, *supra* note 14, at 33–34.

<sup>93</sup> See generally material cited *supra* notes 45–48.

<sup>94</sup> Declaration of Intervention of the Republic of El Salvador, *supra* note 77, 24 ILM at 40. Also, according to Salvadoran President Duarte, Comandante (and now President) Daniel Ortega acknowledged during a European political trip "that he had helped, is helping, and will continue to help the Salvadoran guerrillas." Duarte added that Ortega "placed himself in a position that showed . . . that it is he who is openly and directly attacking and intervening in our country. . . . Obviously, he ha[s] declared himself guilty of intervention." Press Conference of President

Luis Carrión, the Sandinista Vice-Minister of the Interior and a principal witness for Nicaragua before the World Court in the *Nicaragua* case, while reiterating the party line that Nicaragua is not giving support to the insurgents in El Salvador, recently made a statement to a human rights investigating team that indirectly confirmed Nicaraguan involvement: "We are giving no support to the rebels in El Salvador. I don't know when we last did. We haven't sent any material aid to them in a good long time."<sup>95</sup> Interestingly, this statement was reported by a witness for Nicaragua in the World Court case and contradicts the sworn affidavit submitted to the Court by the Nicaraguan Foreign Minister, who testified that Nicaragua never has provided aid to insurgents in El Salvador.<sup>96</sup>

Further testimony of witnesses for Nicaragua before the World Court confirms its involvement in El Salvador despite their best efforts to be helpful. Thus, on direct examination by Abram Chayes, counsel for Nicaragua, David MacMichael, the lead witness for Nicaragua on these issues, participated in the following exchange:

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Duarte, Radio Cadena YSKL in San Salvador, July 27, 1984, FBIS, LATIN AMERICA 2 (July 30, 1984).

Similarly, Comandante Bayardo Arce said:

Imperialism asks three things of us: to abandon interventionism, to abandon our strategic ties with the Soviet Union and the socialist community, and to be democratic. We cannot cease being internationalists unless we cease being revolutionaries. We cannot discontinue strategic relationships unless we cease being revolutionaries. It is impossible even to consider this.

DEPT OF STATE, COMANDANTE BAYARDO ARCE'S SECRET SPEECH BEFORE THE NICARAGUAN SOCIALIST PARTY (PSN) IN MAY OF 1984, at 4 (1984) [hereinafter cited as ARCE'S SECRET SPEECH].

On long-term Sandinista goals, Foreign Minister D'Escoto said in May 1980: "You [the United States] may look at us as five countries, six now with Panama, but we regard ourselves as six different states of a single nation in the process of reunification." See *Nicaragua and the World*, CHRISTIANITY IN CRISIS, May 12, 1980, at 141, reprinted in WHITE HOUSE DIG., June 20, 1984, at 4.

<sup>95</sup> D. FOX & M. GLENNON, REPORT TO THE INTERNATIONAL HUMAN RIGHTS LAW GROUP AND THE WASHINGTON OFFICE ON LATIN AMERICA CONCERNING ABUSES AGAINST CIVILIANS BY COUNTERREVOLUTIONARIES OPERATING IN NICARAGUA 32, 34 (1985) (statement by Luis Carrión).

<sup>96</sup> Professor Glennon testified before the Court for Nicaragua. Foreign Minister D'Escoto Brockmann filed a sworn affidavit with the Court dated Apr. 21, 1984, in which he solemnly declared: "In truth, my government is not engaged, and has not been engaged in the provision of arms or other supplies to either of the factions engaged in the civil war in El Salvador" (see the D'Escoto statement, *infra* note 150) (emphasis added). The contradiction between the Carrión and D'Escoto statements presents several possibilities: the witness for Nicaragua may have erred in the report about which he was testifying, Carrión—Nicaragua's principal witness—may have been wrong, D'Escoto may have overlooked known facts, or even all three.

In addition, the ICJ testimony of Nicaragua's witness David MacMichael flatly contradicts D'Escoto's above-quoted sworn statement. Note also that D'Escoto's statement is narrowly focused on "arms or other supplies," which conveniently excludes the involvement of Nicaragua in organization; command and control; financing; laundering and storage of arms; intelligence assistance; training, political and propaganda assistance; use of its territory as sanctuary; and other forms of substantial complicity in the FMLN insurgency.

Q: Mr. MacMichael, up to this point we have been talking about the period when you were employed by the CIA—6 March 1981 to 3 April 1983. Now let me ask you without limit of time: did you see any evidence of arms going to the Salvadoran rebels from Nicaragua at any time?

A: Yes, I did.

Q: When was that?

A: Late 1980 to very early 1981.

Q: And what were the sources of that evidence?

A: There were a variety of sources: there was documentary evidence, which I believe was codable [credible], there were—and this is the most important—actual seizures of arms shipments which could be traced to Nicaragua and there were reports by defectors from Nicaragua that corroborated such shipments.<sup>97</sup>

Subsequently, Judge Stephen Schwebel questioned Mr. MacMichael about these arms shipments:

Judge Schwebel: . . . My first question is this. You stated that you went on active duty with the CIA on 6 March 1981 and left on 3 April 1983, or about that date. Am I correct in assuming that your testimony essentially relates to the period between March 1981 and April 1983, at least insofar as it benefits from official service?

Mr. MacMichael: That is correct, your honour, and I have not had access since I left to classified materials, and I have not sought access to such material.

Q: Thus, if the Government of Nicaragua had shifted arms to El Salvador before March 1981, for example in 1980 and early 1981, in order to arm the big January offensive of the insurgents in El Salvador, you would not be in a position to know that; is that correct?

A: I think I have testified, your honour, that I reviewed the immediate past intelligence material at that time, that dealt with that period, and I have stated today that there was credible evidence and that on the basis of my reading of it I could not rule out a finding that the Nicaraguan Government had been involved during that period.

Q: Would you rule it "in"?

A: I prefer to stay with my answer that I could not rule it out, but to answer you as directly as I can my inclination would be more towards ruling "in" that [*sic*] "ruling out".<sup>98</sup>

Judge Schwebel, returning to the issue, continued:

Q: I understand you to be saying, Mr. MacMichael, that you believe that it could be taken as a fact that at least in late 1980/early 1981 the Nicaraguan Government was involved in the supply of arms to the

<sup>97</sup> See Verbatim Record, *supra* note 12, CR 85/21, at 20 (Sept. 16, 1985) [hereinafter the Court's numbered documents of the Verbatim Record will be cited by their identification numbers, which include the year, and the date].

<sup>98</sup> *Id.* at 29.



Salvadoran insurgency. Is that the conclusion I can draw from your remarks?

A: I hate to have it appear that you are drawing this from me like a nail out of a block of wood but, yes, that is my opinion.<sup>99</sup>

Shifting to other modes of Nicaraguan involvement in support of the FMLN insurgents, Judge Schwebel elicited the following admissions from Mr. MacMichael:

Q: . . . Mr. MacMichael, is it a fact that leaders of the El Salvadoran insurgency are based in Nicaragua and regularly operate without apparent interference from Nicaraguan authorities in Nicaragua?

A: I think the response to that question would have to be a qualified yes, in that political leaders and, from time to time, military leaders, of the Salvadoran insurgency have reported credibly to have operated from Nicaragua, that this was referred to frequently by the United States Government as a command and control headquarters, and that such an action could certainly be defined as one unfriendly toward the Government of El Salvador recognized by the United States. I have confined my testimony to the charge of arms flow.<sup>100</sup>

. . . .

Q: Mr. MacMichael, have you heard of Radio Liberación?

A: I have heard of Radio Liberación, yes.

Q: What is it? Can you tell the Court, please?

A: It was a predecessor of the basic Radio Venceremos which is used by the FMLN in El Salvador. I believe that at one time a radio broadcast under the title of "Radio Liberación" was supposed to have originated from Nicaraguan soil.

Q: Did they in fact originate from Nicaragua, to the best of your knowledge?

A: To the best of my knowledge I think I would say yes, that is the information I have.<sup>101</sup>

In questioning William Hupper, the Nicaraguan Minister of Finance, Judge Schwebel subsequently summed up the factual points he believed established by Nicaragua's own witnesses:

Q: . . . You were not present during the examination of other witnesses. Let me summarize for you some facts that will be on a question I am about to ask you, which I think can be fairly deduced from the testimony introduced so far.

(a) The Nicaraguan Government has been a source of arms for the insurgency in El Salvador, particularly—possibly exclusively, but certainly particularly—for the big offensive of the El Salvadoran insurgents.

<sup>99</sup> *Id.* at 41.

<sup>100</sup> *Id.* at 34–35.

<sup>101</sup> *Id.* at 39–40.

- (b) The leadership of the El Salvadoran insurgents freely operates out of Managua and elsewhere in Nicaragua.
- (c) A radio station of the El Salvadoran insurgents has broadcast from Nicaraguan territory.
- (d) The training of El Salvadoran insurgents may well take place in Nicaragua as well as Cuba.<sup>102</sup>

As with Foreign Minister D'Escoto's sworn affidavit to the Court, Nicaragua sought in presenting its case to mislead the Court by focusing solely on arms supply and ignoring all other major forms of Sandinista assistance to the insurgency. Yet even with respect to arms supply, its own lead witness contradicted the sworn affidavit of the Foreign Minister.

Nicaragua's witnesses before the Court also established several other points of importance to a legal appraisal of the Central American conflict. Thus, Vice-Minister of the Interior and former Vice-Minister of Defense Luis Carrión unequivocally dated the first contra attack as from December 1981.<sup>103</sup> This was, as we have seen, at least a year to a year and a half after Nicaragua gave major assistance to the FMLN insurgents in El Salvador, which was also confirmed by Nicaragua's witnesses. David MacMichael, questioned on direct examination by Abram Chayes, confirmed that the purpose of assisting the contras was "to interdict" the flow of arms.<sup>104</sup>

The record is unmistakable for any serious observer. Cuba and Nicaragua have been participating in a secret war against El Salvador and subversive attacks against other Central American neighbors at least since mid-1980. Those attacks are continuing.

#### *U.S. Efforts at Peaceful Settlement*

The United States and the attacked nations of the region have made, and continue to make, every effort to resolve the Central American conflict peacefully. The Carter administration's 1980 protest and the one-month suspension of arms shipments by Nicaragua have already been mentioned. Still seeking constructive relations, the Carter administration as late as September 1980 certified to Congress that Nicaragua was not giving assistance to international terrorism, so as to be able to continue American economic aid that would by law be terminated if a finding of such assistance were made. In view of the evidence at that time, this certification was controversial within the administration.<sup>105</sup> By December 1980, the intelligence on Sandinista involvement was overwhelming. Shortly thereafter, the Carter administration suspended AID and PL-480 sales to Nicaragua and resumed military assistance to El Salvador.

<sup>102</sup> CR 85/23, at 24-25 (Sept. 17).

<sup>103</sup> CR 85/19, at 24 (Sept. 12).

<sup>104</sup> CR 85/21, at 8 (Sept. 16).

<sup>105</sup> On the controversy, see *U.S. Support for the Democratic Resistance Movement in Nicaragua, Excerpts from the President's Report to the Congress Pursuant to Section 8066 of the Continuing Resolution for FY-1985*, reprinted in *U.S. Support for the Contras: Hearing Before the Subcomm. on Western Hemisphere Affairs of the House Comm. on Foreign Affairs*, 99th Cong., 1st Sess. 199, 210 (1985) [hereinafter cited as *U.S. Support*].

During 1981–1982, the Reagan administration made two major diplomatic efforts to bring about a peaceful end to the secret attacks from Nicaragua. Assistant Secretary of State Thomas O. Enders visited Managua in August 1981 and offered to renew economic assistance in exchange for an end to Sandinista support for the guerrillas. The offer was tied solely and explicitly to an end by the Sandinistas of attacks against El Salvador and neighboring states. Edén Pastora, a participant in the National Leadership of Nicaragua at the time of the Enders visit, recently reported that Daniel Ortega told Fidel Castro that

Enders had confided privately that as a U.S. representative, he has come to Nicaragua not to defend the rights of the democratic opposition, but rather to insist that the FSLN meddling in El Salvador must stop. . . . Enders had told Daniel that the Nicaraguans could do whatever they wished—that they could impose communism, they could take over *La Prensa*, they could expropriate private property, they could suit themselves—but they must not continue meddling in El Salvador.

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The Sandinistas never responded to the Enders offer and their ambassador to the United States, Arturo Cruz, resigned shortly thereafter in frustration at these developments. In April 1982, the United States made an eight-point proposal reiterating the August offer and emphasizing international verification of arms limitations and reaffirmation by Nicaragua of its OAS commitments to support pluralism, free elections and a mixed economy.

In October 1982, the United States joined eight democracies of the region in drawing up the San José Declaration, which outlined essential conditions for peace. The Sandinistas refused both to meet with the group's designated spokesman, Costa Rican Foreign Minister Volio, and to discuss the San José principles.

The United States supported efforts begun by Colombia, Panama, Mexico and Venezuela in January 1983 at Contadora, Panama to mediate a regional settlement.<sup>107</sup> These "Contadora" talks, which were supported by the OAS, produced agreement on a 21-point Document of Objectives whose verifiable implementation would have met U.S. concerns. Since late 1984, the Contadora discussions have focused on resolving differences between a September 21 draft supported by Nicaragua—which Nicaragua insists be accepted without change—and prepared amendments by Honduras, El Salvador and Costa Rica, as well as on efforts to strengthen verification.<sup>108</sup>

<sup>106</sup> Pastora, *supra* note 90, at 10–11.

<sup>107</sup> For an excellent description of the Contadora process, see Purcell, *Demystifying Contadora*, 64 FOREIGN AFF. 74 (1985).

<sup>108</sup> See generally *U.S. Support*, *supra* note 105; DEP'T OF STATE, SPECIAL REP. NO. 115, U.S. EFFORTS TO ACHIEVE PEACE IN CENTRAL AMERICA (1984). According to Susan Purcell, Director of the Latin American Program at the Council on Foreign Relations:

[T]he United States rejected the [Contadora Draft] Acta [of Sept. 7, 1984] because it was a vague statement of goals without concrete limits on Nicaraguan action. Its provisions for unification and enforcement were totally inadequate, and it deferred negotiation on foreign military and security advisors and arms and troop reductions until after signature

The Contadora process was interrupted for a 6-month period from late 1984 to early 1985, in part because of a Nicaraguan action in disregard of the Latin American doctrine of asylum. A Nicaraguan resisting the newly imposed draft, Mr. Urbina Lara, took refuge in the Costa Rican Embassy. At a moment when the Costa Rican diplomats had briefly left the embassy, Urbina Lara was forcibly removed from the building by the Sandinistas and was wounded and imprisoned. Costa Rica refused to participate further in the Contadora process until Urbina Lara was allowed to leave Nicaragua.<sup>109</sup>

On June 1, 1984, Secretary of State George Shultz visited Managua and proposed direct discussions between Nicaragua and the United States. It was made clear that the purpose was to facilitate the Contadora process. Pursuant to this initiative, the United States Special Envoy, Ambassador Harry Shlaudeman, held nine meetings with the Sandinistas between June and December 1984, largely in Manzanillo, Mexico. Those discussions did not lead to a solution.

It has frequently been suggested that the United States resort to the Organization of American States. To date, however, the OAS has clearly preferred not to be involved and has pointedly endorsed the Contadora process. Even more importantly, Nicaragua has viewed the OAS as a hostile forum and has sought to prevent it from considering the issues.<sup>110</sup> They have been brought before the UN General Assembly and Security Council on numerous occasions, but the United Nations has also tended to defer to the Contadora process.<sup>111</sup> The United States has further tried through multiple channels with third countries to encourage the Sandinistas to accept a peaceful solution. Those efforts have so far proved unproductive.<sup>112</sup>

### *Contra Assistance as a Response*

There was no significant military opposition to the Sandinistas until the spring of 1982. That was over a year and a half *after* the sustained secret attack began on El Salvador in mid-1980 and more than 6 months *after* Enders's effort to resolve the attack peacefully—indeed, to resume economic assistance to the Sandinistas if they would simply cease their attack—went

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of the treaty. On the other hand, it required the United States upon signature to cease military exercises and support for the contras. Further military aid to El Salvador and Honduras was frozen, while Nicaragua was allowed to maintain its military advantage over these two countries. The provisions for democratization and internal reconciliation were hortatory and unenforceable as drafted.

Purcell, *supra* note 107, at 77.

<sup>109</sup> See BUREAU OF PUBLIC AFFAIRS, DEP'T OF STATE, CURRENT POLICY NO. 679, NICARAGUA: THE STOLEN REVOLUTION (1985).

<sup>110</sup> See generally material cited *supra* note 108.

<sup>111</sup> See generally DEP'T OF STATE RESOURCE BOOK, THE CONTADORA PROCESS 3-5 (no date).

<sup>112</sup> See, e.g., on U.S. efforts to promote democracy in Central America, particularly the U.S. position on the San José principles, The Final Act of Meeting of Foreign Ministers of Countries Interested in the Promotion of Democracy in Central America, *reprinted in* DEP't of State, Declaration of Democracy in Central America 3 (1982). See also Address by George Shultz, Secretary of State, DEP'T ST. BULL., No. 2074, May 1983, at 10.

unanswered. When the Sandinistas announced their intention to build a 200,000-man militia in February 1981, there was "surprisingly little counter-revolutionary activity."<sup>113</sup>

It seems clear from press and first-person accounts that the armed military opposition to the Sandinistas developed spontaneously and independently.<sup>114</sup> These same press reports and open congressional discussion also suggest that, in response to the continuing Sandinista attacks, the United States and some other nations began providing assistance to the opposition.<sup>115</sup> The U.S. objectives have been to assist in interdicting the attacks through direct assaults on weapons shipment points<sup>116</sup> and through the diversion of Nicaraguan resources to internal concerns. Most importantly, the contra policy seems intended to convince Nicaragua to cease the armed attacks on its neighbors.

United States assistance to the groups variously known as "contras" or "democratic resistance forces" has been carefully controlled. Under the Boland amendment, Congress insisted that the U.S. objective not be to overthrow the Government of Nicaragua, despite its secret armed attack on neighboring states, but solely to protect neighboring states from these attacks.<sup>117</sup> By mid-1984 Congress had further hardened its position, and, amidst the controversy over the April 6 letter to withdraw from the jurisdiction of the World Court, terminated remaining assistance to resistance groups in Nicaragua.<sup>118</sup>

In mid-1985 Congress softened its stance following Comandante Daniel Ortega's highly visible trip to Moscow immediately after the vote to cut off aid to the contras. Although, at first, it seemed that the administration would be rebuffed again, Congress now voted to provide "non-lethal humanitarian" aid to the contras, but prohibited the Department of Defense and the CIA from administering it.<sup>119</sup> The *Washington Post* recently reported that the new State Department office administering this aid plans to use it only for food, medicine and clothing.<sup>120</sup> Earlier, Congress had effectively terminated

<sup>113</sup> See *supra* note 45 and accompanying text.

<sup>114</sup> See, e.g., Pastora, *supra* note 90, at 7 (on the founding of ARDE). Pastora writes that he "decided to renew the struggle for democracy in Nicaragua, having understood that the . . . [FSLN] had turned our revolution over to Soviet interests." *Id.*

<sup>115</sup> See, e.g., N.Y. Times, Apr. 7, 1983, at A16, cols. 1-6.

Some early Argentinian assistance to the contras has also been reported. See Joyner & Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 VA. J. INT'L L. 621, 634 n.68 (1985).

<sup>116</sup> The contras have successfully attacked such points, for example, the arms transshipment point La Concha in Nicaragua.

<sup>117</sup> For a detailed discussion of the background debate and congressional intent on the Boland amendment, see H.R. REP. NO. 122, *supra* note 70, at 25-26. For the amendment, see Pub. L. No. 97-377, §793, 96 Stat. 1865 (1982).

<sup>118</sup> Tolchin, *Senators, 88 to 1, Drop Money to Aid Nicaragua Rebels*, N.Y. Times, June 26, 1984, at A1, A8, col. 6.

<sup>119</sup> Roberts, *House Reverses Earlier Ban on Aid to Nicaragua Rebels, Passes \$27 Million Package*, N.Y. Times, June 13, 1985, at A1, A12, col. 6.

<sup>120</sup> See Omang, *Contra Aid Now Available*, Wash. Post, Oct. 5, 1985, at A2, cols. 3-4. See also Wash. Post, Aug. 31, 1985, at A29, cols. 1-2 (on the restrictions of the aid and prohibition on CIA and Department of Defense participation in administering the funds).

any small-scale mining option by passing a sense of the Senate resolution disapproving any such action.<sup>121</sup>

The contrast between the all-out Cuban-Nicaraguan support for the FMLN and the cautious, on-again, off-again United States support for the contras is striking. Even though assistance to the contras is a defensive response to an armed attack, Congress has restricted U.S. actions to make it clear that such support is not to be given for the purpose of overthrowing the Government of Nicaragua and it has prohibited small-scale mining of harbors. For a substantial period, all assistance was terminated, and since its renewal, it has consisted only of nonlethal humanitarian aid that may not be administered by the Department of Defense or the CIA. In contrast, Cuba and Nicaragua have provided unstinting political and military support to the insurgents in El Salvador; the very purpose of their attack is to overthrow the democratically elected Government of El Salvador. No Boland amendment, fund cutoffs or other limitations hamper their attacks. They provide a full range of support services to the insurgents, have stepped up the indiscriminate use of land mines and would certainly regard as laughable any suggestion that their assistance should be limited to nonlethal humanitarian aid.

Despite these differences in kinds and levels of support, the FMLN insurgency has decreased in number from approximately nine thousand to six thousand and, according to Nicaragua's own testimony before the World Court, the "contra" groups have grown from approximately seven thousand at the end of 1983 to nearly eleven thousand by late 1985.<sup>122</sup> It should be noted that during much of the period when this significant growth of the democratic resistance took place, the United States by law provided no assistance. The principal difference seems to be that the FMLN has little political support in El Salvador, as that country has made a successful transition to a reformist democracy, while opposition has been dramatically mounting in Nicaragua as the comandantes move toward totalitarianism.<sup>123</sup> The political platforms of the two insurgent groups reflect this difference. The FMLN has refused to participate in elections and has insisted on a "brokered" power-sharing arrangement.<sup>124</sup> In contrast, the contras have asked to par-

<sup>121</sup> Roberts, *Senators Modify Bill on Rebel Aid*, N.Y. Times, June 8, 1985, at 1, 6, col. 5.

<sup>122</sup> See CR 85/20, at 11 (Sept. 13). Note that according to the *Washington Post*, in 1983, during a period of U.S. assistance to the contras, the U.S. Government provided each contra soldier with a "subsistence fee" of \$23 per month. Oberdorfer & Tyler, *U.S.-Backed Nicaraguan Rebel Army Swells to 7,000 Men*, Wash. Post, May 8, 1983, at 1. Compare this figure with the average monthly salary for a "worker" in Nicaragua in January 1985, which "ranged between \$110 and \$150." See Vargas Llosa, *In Nicaragua*, N.Y. Times, Apr. 28, 1985, §6 (Magazine), at 45.

<sup>123</sup> On El Salvador, see LeMoyné, *Salvador Puts Guerrillas on the Defensive*, N.Y. Times, May 19, 1985, at D1; McCartney & Omang, *Democracy Gaining in El Salvador, U.S. Believes*, Wash. Post, June 2, 1985, at A1, A20, cols. 2-5. On Nicaragua, see, e.g., Ritter, *Help the Contras*, N.Y. Times, Apr. 11, 1985, at A21 (op-ed.).

<sup>124</sup> One authority has estimated that only about 1.7% of El Salvador's five million people support the FMLN insurgency, which explains why the FMLN consistently rejects participation in elections. See Young, *El Salvador: Communist Blueprint for Insurgency in Central America*, 5 CONFLICT: ALL WARFARE SHORT OF WAR 307, 329 (1985).

ticipate in internationally observed free elections and have even agreed that the comandantes could continue in power while such elections were held. On Easter Sunday, 1984, all nine of Nicaragua's Catholic bishops signed a pastoral letter on reconciliation urging a dialogue between the armed resistance and the Nicaraguan Government.<sup>125</sup> The contras have repeatedly accepted this call, most recently in their "Document on National Dialogue of the Nicaraguan Resistance," announced in San José, Costa Rica on March 2, 1985.<sup>126</sup> The comandantes, however, have refused the invitations by both the bishops and the democratic resistance.

It is instructive in understanding the origins, motivation and program of the democratic resistance groups to look to their own statement of purpose. For example, the "Document on National Dialogue," mentioned above, provides:

[T]he national crisis we face did not grow out of a confrontation between imperialism and the revolution, as the Sandinista Front pretends, but out of the contradictions which emerge from the clash between democratic expectations of the Nicaraguan people and the imposition of a totalitarian system such as that which is being implanted in our country by the Sandinista Front.

This conflict, which has produced a civil war, today threatens to destroy the Nicaraguan nation. . . .

The solution to the national crisis can only be found through a genuine understanding among all Nicaraguans that might end the civil war and lead to the reconciliation of the Nicaraguan family.

We wish to emphasize that this initiative is not taken merely to search for a quota of power, but rather it seeks only to establish in Nicaragua the rule of law which will permit the people to live in peace and to go about resolving our problems within a new constitutional order. . . .

We support fully the minimum requirements demanded by the Democratic Coordinator in order to initiate the National Dialogue. They are: Suspension of armed activities, with a cease-fire *in situ*; lifting of the state of emergency; absolute freedom of expression and assembly; general amnesty and pardon for political crimes and related crimes; entry into effect of the right of asylum and habeas corpus, adding the granting of full protection of the physical and moral integrity of those members of the Resistance who participate in the dialogue, in the event that it should take place in Nicaragua.

The application of these measures should be carried out under the supervision of the guarantor governments. . . .

<sup>125</sup> Reprinted in 130 CONG. REC. S5158, S5158-59 (daily ed. May 1, 1984).

<sup>126</sup> Document on National Dialogue of the Nicaraguan Resistance, signed by the various leaders and read to members of the Nicaraguan exile community in San José, Costa Rica, Mar. 12, 1985 (on file at the Center for Law and National Security). Edward Cody of the *Washington Post* reports that the Democratic Coordinator, "an opposition alliance" and "the Catholic Church hierarchy" have "joined the Reagan administration in calling for a dialogue between the government and the rebel leadership." See Cody, *Nicaraguan Crackdown Seen Aimed at Church*, Wash. Post, Oct. 17, 1985, at A1, cols. 2-4, A33.

If this dialogue is carried out, we commit ourselves to accept that Mr. Daniel Ortega continue acting as head of the Executive Branch until such time as the people pronounce themselves in a plebiscite. During this period, Mr. Ortega should govern in fulfillment of the promises of the Nicaraguan Revolutionary Government Junta contained in the document of July 12, 1979 and directed to the Secretary General of the Organization of American States, and in fulfillment of the Original Program of Government, the Fundamental Statute and the American Human Rights Convention and the Pact of San Jose. . . .

Although it will be up to the Bishops Conference to establish a definitive agenda, by agreement of the parties, we urge it to include as of now the following points:

1) That the legal procedure and actions of the government conform immediately to the American Convention on Human Rights, or the Pact of San Jose, which was ratified by the Nicaraguan Government of National Reconstruction on September 25, 1979, declaring it the law of the land and committing the national honor to its enforcement.

2) The dismantlement and immediate dissolution of all the party repressive organisms such as the CDS (Sandinista Defense Committees) and the other para-military organs.

3) . . . the apolitical nature of the army, an end to the arms race, and the withdrawal of all foreign military troops and advisors and internationalists.

4) Immediate dissolution of the National Constituent Assembly.

5) A new provisional electoral law.

6) A new provisional law for political parties.

7) Re-structuring of the electoral system in accordance with the above provisional laws.

8) Calling of elections for a National Constituent Assembly.

9) Calling of municipal elections.

10) Calling of a plebiscite on the conduct of new presidential elections.<sup>127</sup>

Even this program of the Nicaraguan resistance is not dedicated to forcefully overthrowing the Government of Nicaragua, but rather to pressuring that Government to guarantee human rights and to hold free elections as pledged to the OAS and the people of Nicaragua.

To put the 12,000-15,000 contra level in perspective, in 1978—one year before Somoza was overthrown—Sandinista strength stood at about one thousand in a widely popular revolution. It only took about five thousand guerrillas to topple the regime.<sup>128</sup> Current levels of contra forces thus suggest widespread Nicaraguan opposition to the comandantes. The Nicaraguan bishops explicitly recognized this substantial internal opposition to the San-

<sup>127</sup> Document on National Dialogue, *supra* note 126.

<sup>128</sup> See SOVIET-CUBAN CONNECTION, *supra* note 14, at 22.



dinistas as a principal cause of the Nicaraguan conflict when they wrote in their Easter pastoral letter: "It is dishonest to constantly blame internal aggression and violence on foreign aggression."<sup>129</sup>

Although Sandinista propaganda has sought to paint the contras as former "Somocistas," the reality is quite different. Edén Pastora, the leader of one faction of the Democratic Revolutionary Alliance, or ARDE, was the famous "Commander Zero" who fought with the Sandinistas against Somoza. In fact, he was both commander in chief of the revolutionary army against Somoza and the greatest hero of the revolution.<sup>130</sup> Arturo Cruz, a leading democratic political candidate associated with the democratic opposition alliance, was twice jailed by Somoza and served as president of the Nicaraguan central bank and Ambassador to the United States under the Sandinistas. Adolfo Calero, the commander in chief of the armed forces of the FDN, was a lifelong opponent of Somoza and assisted in the political action that ousted him. Calero's distinguished career included service as dean of the faculty of economics and business administration at the University of Central America. He, too, was jailed by Somoza. Alfonso Robelo, the leader of a faction of ARDE, was one of the five original members of the Sandinista junta. He resigned in 1980 over the Sandinista packing of the Legislative Council in violation of the Fundamental Statute of the Republic, and in 1982 he went into exile in Costa Rica.

In short, the opposition to the Sandinistas is democratic and broad based.<sup>131</sup> It is by no means simply a creation of external support. The evidence also suggests that assistance to the contras is moderating the secret war against El Salvador and neighboring states.

### *The Worldwide Misinformation Campaign*

For the democracies, one of the most dangerous—and puzzling—elements of the current assaults by radical regimes is that their covert nature makes them difficult to accept.<sup>132</sup> To make acceptance more difficult, they are frequently masked by a cloud of misinformation and propaganda. Substantial evidence suggests that attention is concentrated on this political front in such assaults.<sup>133</sup> The secret attack against El Salvador and neighboring Central American states is no exception. As Philip Taubman wrote in the *New*

<sup>129</sup> 130 CONG. REC. at S5158.

<sup>130</sup> In fact, Pastora's father was killed by Somoza's National Guard. A substantial amount has been written about the famous "Commander Zero." See, e.g., *Christian Sci. Monitor*, June 22, 1979, at 12, col. 3; *Chicago Tribune*, June 29, 1979, at 2, col. 1; *ECONOMIST*, May 10, 1980, at 21; and Arostegui, *Revolutionary Violence in Central America*, *INT'L SECURITY REV.*, Spring 1979, at 89. See also Pastora, *supra* note 90, at 5.

<sup>131</sup> On the composition of the "democratic opposition" or "contras," see DEP'T OF STATE, *GROUPS OF THE NICARAGUAN DEMOCRATIC RESISTANCE: WHO ARE THEY?* (1985).

<sup>132</sup> For a discussion of the reappraisal now taking place in Europe with respect to the Central American conflict, see Ledeen, *European Policy Intellectuals and U.S. Central American Policy*, *WASH. Q.*, Summer 1985, at 187.

<sup>133</sup> See, e.g., R. SCHULTZ & R. GODSEN, *DEZINFORMATSIA: ACTIVE MEASURES IN SOVIET STRATEGY* (1984).

*York Times* in 1982: "In recent months, with increasing sophistication, the leaders of the guerrilla movement in El Salvador have mounted a public relations campaign directed at world opinion in general, and at American public opinion in particular."<sup>134</sup> Today the FMLN operates more than 60 offices in 35 countries to support its attack against the Government of El Salvador. Nicaragua has worked to create a network of "solidarity committees" within the democracies, particularly the United States, the Western European countries, Canada and Australia. Arturo Cruz has estimated that there are 200 such committees in the United States and 60 in West Germany, just to name two targeted countries.<sup>135</sup> Alejandro Montenegro has confirmed that these "solidarity groups" "are instructed from Nicaragua."<sup>136</sup> Moreover, on the basis of his own conversations with defectors from Cuban intelligence organizations, the current editor of the *Washington Times* and former *Newsweek* correspondent, Arnaud de Borchegrave, gave the following detailed testimony to the Kissinger Commission:

Documents . . . which I would be happy to make available to the Commission, cast light on one well-organized active measures operation, intended to isolate the Salvadoran government from American sympathy and to mobilize support in the U.S. for the guerrillas through the channel of a "solidarity committee" set up with the help of Cuban intelligence officers operating under the cover of the United Nations in New York City.

CISPES was formed in October 1980 as a direct result of a visit to the U.S. by Farid Handal, brother of the Secretary General of the Salvadoran Communist Party Shafik Handal. His principal adviser in this venture was Alfredo Garcia Almeida, at that time the Station Chief of the Departamento de America of the Cuban Communist Party in New York. . . .

CISPES was subsequently set up as a tax-exempt organization with an office in Washington and countrywide chapters, that included 500 college campuses.<sup>137</sup>

As part of their propaganda effort, the comandantes have encouraged a sophisticated and extensive political campaign in the United States featuring trips for Americans to Nicaragua,<sup>138</sup> public appearances by Nicaraguan

<sup>134</sup> Taubman, *Salvadorans' U.S. Campaign: Selling of Revolution*, N.Y. Times, Feb. 26, 1982, at A10, cols. 3-6.

<sup>135</sup> Nicaragua and the Crisis in Central America, Address by Arturo Cruz, at the National Strategy Information Center, Defense Strategy Forum, Washington, D.C. (May 22, 1985). The Sandinistas have also been working assiduously to bring opinion leaders from the United States, and the West in general, on controlled trips to Nicaragua.

<sup>136</sup> See H.R. Republican Study Committee, *supra* note 88, at 4-5.

<sup>137</sup> Reported in Young, *supra* note 124, at 326-27.

<sup>138</sup> See, e.g., *Report on Travel Seminars Conducted by Center for Global Service and Education, Augsburg College, Minneapolis, MN*, reprinted in 131 CONG. REC. H2042 (daily ed. Apr. 16, 1985) (introduced by Rep. Weber). According to Congressman Weber, "One of the things we found down there from the people in Nicaragua, particularly the people in the Catholic Church, was a deep concern about the biased nature of the information given to American church groups visiting Nicaragua." *Id.* at H2043. A participant in one such trip concluded: "The travel seminars

spokesmen before American audiences, films and even direct phone lobbying by Daniel Ortega of individual American congressmen before key congressional votes. The comandantes have hired a Washington law firm to lobby for them in the United States and to represent them before the World Court. In addition to lobbying Congress, this firm is said to have been instrumental in instigating alleged human rights reporting on the contras' activities.<sup>139</sup> Similarly, the comandantes have hired a public relations firm, Agenda International, to help sway public opinion.<sup>140</sup> The following example demonstrates the sophistication of the Sandinista propaganda effort in the United States: when it became apparent that Senator David Durenberger of Minnesota would become Chairman of the Senate Select Committee on Intelligence, a committee essential to funding the contras, pro-Sandinista activities increased dramatically in the state of Minnesota.<sup>141</sup>

Comandante Bayardo Arce, in a May 1984 secret speech before a small Nicaraguan Moscow-oriented Communist party, talked openly of the deliberate deception of the democracies by the comandantes. In his speech—which began “Good morning, comrades” and talked of “we Communists”<sup>142</sup>—he said, “We have not declared ourselves Marxist-Leninists publicly. . . .”<sup>143</sup> One of his major themes was that the Sandinistas, as Marxist-Leninists, were maintaining democratic support by professing support for the OAS conditions. Thus, he said, “We are using an instrument claimed by the bourgeoisie, which drains the international bourgeoisie, in order to move ahead in matters that for us are strategic.”<sup>144</sup> Comandante Arce repeatedly confirmed the importance to the Sandinistas of international opinion—and domestic opinion within the United States—and even bragged that they were “still achieving some degree of domestic neutralization in the U.S.”<sup>145</sup> Above all, he admitted that a principal purpose of the international deception is to build a Marxist-Leninist state in Nicaragua with Western financial assistance: “Our strategic allies tell us not to declare ourselves Marxist-Leninists, not to declare socialism. Here and in Rome, we know, we’ve talked

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. . . are not objective educational experiences designed to acquaint women with the problems of Central America as they are purported to be. They are instead two weeks of intensive anti-United States pro-Sandinista indoctrination.” *Id.*

<sup>139</sup> The Washington law firm of Reichler & Applebaum is registered under the Foreign Agents Registration Act as an agent of Nicaragua in the United States (Registration No. 3582). The firm is reported to have assisted in a widely publicized “human rights investigation” into alleged contra atrocities (the Reed Brody report of February 1985). See D. FOX & M. GLENNON, *supra* note 95, at iv.

A major strategy of the Sandinista ICJ case, intended to appeal to an American audience and the Court, has been to maximize use of Americans as counsel and witnesses. See Shaw, *Americans to Testify Against U.S. in Nicaraguan World Court Case*, Wash. Post, Sept. 8, 1985, at A17, cols. 1–5.

<sup>140</sup> See Miller, *Ortega Uses Public Relations to Present His Case to U.S.*, Boston Globe, Oct. 28, 1985, at 4, cols. 4–6.

<sup>141</sup> Discussion with Christopher Barton, a member of Senator Durenberger’s staff in Washington, D.C., Aug. 18, 1985.

<sup>142</sup> ARCE’S SECRET SPEECH, *supra* note 94, at 2.

<sup>143</sup> *Id.* at 6.

<sup>144</sup> *Id.* at 5.

<sup>145</sup> *Id.* at 3.

about this being the first experience of building socialism [Marxism-Leninism] with the dollars of capitalism."<sup>146</sup>

Recently, the *Washington Post* carried an account of the defection of Mateo Guerrero, former executive director of Nicaragua's National Commission for the Promotion and Protection of Human Rights. According to that account, Guerrero defected because the Sandinistas had politicized the Commission in support of their propaganda war:

The commission, established in 1980 to probe human rights abuses, has gradually come under control of the Nicaraguan Foreign Ministry, which has tried to convert the office into a government propaganda arm. . . .

[The Ministry's Secretary General] told two commission officials last January that the panel would help the government establish liaisons with foreign human rights groups to draw international attention to abuses by antigovernment rebels.

The commission leaders were told to stop investigating any abuse committed by the government of Nicaragua and to concentrate their efforts on the anti-Sandinistas.<sup>147</sup>

Similarly, Alvaro Baldizón, a recent high-level defector from the Interior Ministry, has described the bizarre methods by which the FSLN sought to dupe foreign delegations in Nicaragua as part of the war of misinformation.<sup>148</sup>

<sup>146</sup> *Id.* at 7. Comandante Arce says of elections in Nicaragua:

What a revolution really needs is the power to act. The power to act is precisely what constitutes the essence of the dictatorship of the proletariat—the ability of the [working] class to impose its will by using the means at hand [without] bourgeois formalities. For us, then, the elections, viewed from that perspective, are a nuisance, just as a number of things that make up the reality of our revolution are a nuisance.

*Id.* at 4.

<sup>147</sup> Gedda, *Nicaraguan Defects: Human Rights Official Given Asylum in U.S.*, *Wash. Post*, Aug. 21, 1985, at A13, cols. 1–3. For a summary of information supplied by Guerrero, see *Inside Sandinista Regime*, *supra* note 28. Note also that

Bendana stated that, acting on the authority of President Daniel Ortega and Foreign Minister Miguel D'Escoto, he would personally direct the CNPPDH for the purpose of promoting a [sic] international offensive by the Nicaraguan government denouncing abuses allegedly committed by anti-Sandinista forces. He noted that the CNPPDH would help establish a network of foreign human rights organizations to publicize these abuses throughout the world.

*Id.* at 3.

<sup>148</sup> According to Baldizón:

Borge prepares himself for visits from foreign Christian religious organizations or speeches to these groups by studying the Bible and extracting appropriate passages for use in his conversations or address. When the foreign visitors have departed he scoffs at them in front of his subordinates, bragging about his ability to manipulate and exploit the "deluded" religious group. . . .

In January 1985, Tomas Borge ordered Baldizón's office to seek out and provide him with persons in dire economic straits or with serious health problems who would then be used in staged "shows" before visiting foreign political or religious groups. A quota of six such persons was to be furnished every 15 days. . . .

Cuba has also played an active role in the propaganda war. Earl Young, an intelligence expert on the Central American conflict, writes: "Recent defectors from various Cuban government departments have stated that this propaganda effort [on behalf of the guerrillas in El Salvador] is conducted by Soviet-trained Cuban specialists with Eastern European support."<sup>149</sup> The propaganda has focused on denying that insurgents in neighboring states were being assisted,<sup>150</sup> making exaggerated human rights charges against the Government of El Salvador and the contras, supporting the FMLN as a "democratic alternative," attacking the contras as "Somocistas," denouncing the U.S. response as ideological anticommunism rather than collective defense, and characterizing the United States withdrawal from the *Nicaragua* case as "proof" of the illegality of U.S. actions.

### III. LEGAL ISSUES IN THE CONFLICT

#### *The Cuban-Nicaraguan Secret War*

It is not surprising that the comandantes deny their secret war against neighboring states. There can be no debate that the Cuban-Nicaraguan attacks are in blatant disregard of international law. Important Charter norms and declarations violated by these attacks include:

- Article 2(4) of the United Nations Charter;<sup>151</sup>
- Articles 3, 18, 20 and 21 of the revised Charter of the Organization of American States;<sup>152</sup>

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In May 1985, such a show was staged for the benefit of a visiting delegation of the West German Christian Democratic Union/Christian Social Union (CDU/CSU). In this show, a blind man who had earlier requested an accordion so he could entertain to earn his living, was presented with an instrument. . . . The instrument was to be repossessed from the blind man after his show appearance. . . .

Information Supplied by Alvaro Baldizon Aviles, *supra* note 28, at 17-19.

<sup>149</sup> See Young, *supra* note 124, at 325.

<sup>150</sup> When asked about their support for insurgencies in neighboring states, the Sandinistas typically respond by flatly denying the secret war. Thus, Foreign Minister D'Escoto declared in a sworn affidavit to the World Court: "I am aware of the allegations made by the Government of the United States that my Government is sending arms, ammunition, communications equipment and medical supplies to rebels conducting a civil war against the Government of El Salvador. Such allegations are false. . . ." Affidavit of Foreign Minister Miguel D'Escoto Brockmann, Memorial of Nicaragua (Nicar. v. U.S.), Ann. B (submitted Apr. 30, 1985), reprinted in *REVOLUTION BEYOND OUR BORDERS*, *supra* note 68, at 1. The comandantes also have repeatedly and inaccurately predicted a U.S. invasion of Nicaragua; one such prediction coincided with the opening of oral argument in the jurisdictional phase of the *Nicaragua* case. See *id.* at 2. See, e.g., Omang, *Nicaraguan Leader Says U.S. Planning Invasion Oct. 15*, Wash. Post, Oct. 3, 1984, at A1, A24. See also "60 Minutes," *supra* note 16.

According to Lawrence Harrison, when he complained about the "inaccuracies and distortions in Barricada . . . and El Nuevo Diario," the Nicaraguan Minister of Health told him, "You don't understand revolutionary truth. What is true is what serves the ends of the revolution." See Harrison, *supra* note 16, at A27.

<sup>151</sup> Article 2(4) provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

<sup>152</sup> OAS CHARTER, done at Bogotá Apr. 30, 1948, 2 UST 2394, TIAS No. 2361, 119 UNTS 3, as amended, Feb. 27, 1967, 21 UST 607, TIAS No. 6847. These articles of the revised

- Articles 1 and 3 of the hemispheric Rio Defense Treaty;<sup>153</sup>
- Articles 1, 2, 3 and 5 of the United Nations Definition of Aggression;<sup>154</sup>
- Article 3 of the 1949 General Assembly Essentials of Peace Resolution;<sup>155</sup>
- Article 1 of the 1950 General Assembly Peace through Deeds Resolution;<sup>156</sup>
- Article 2 of the International Law Commission's 1954 Draft Code of Offences against the Peace and Security of Mankind;<sup>157</sup>
- the 1965 General Assembly Declaration on the Inadmissibility of Intervention;<sup>158</sup> and
- the 1970 General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States.<sup>159</sup>

Soviet assistance, direct or indirect, in such attacks violates not only the above Charters and declarations, but also principles intended to promote world order contained in:

- the 1972 declaration on "Basic Principles";<sup>160</sup>
- Principles IV and VI of the 1975 Helsinki Final Act;<sup>161</sup> and even
- the Soviet Draft Definition of Aggression.<sup>162</sup>

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Charter embody the historical Latin American prohibitions on indirect aggression and intervention embodied, e.g., in the Convention on the Duties and Rights of States in the Event of Civil Strife (1928), 46 Stat. 2749, TS No. 814, 134 LNTS 45; and the Montevideo Convention on Rights and Duties of States (1933), 49 Stat. 3097, TS No. 881, 165 LNTS 19.

<sup>153</sup> Inter-American Treaty of Reciprocal Assistance (Rio Treaty), Sept. 2, 1947, 62 Stat. 1681, TIAS No. 1838, 21 UNTS 77.

<sup>154</sup> GA Res. 3314, 29 UN GAOR Supp. (No. 31) at 143, UN Doc. A/9631 (1974).

<sup>155</sup> GA Res. 290, 4 UN GAOR Res. (20 Sept.-10 Dec.) at 13, UN Doc. A/1251 and Corrs. 1 & 2 (1949).

<sup>156</sup> GA Res. 380, 5 UN GAOR Supp. (No. 20) at 13, UN Doc. A/1775 (1950).

<sup>157</sup> 9 UN GAOR Supp. (No. 9) at 11, UN Doc. A/2693 (1954).

<sup>158</sup> GA Res. 2131, 20 UN GAOR Supp. (No. 14) at 11, UN Doc. A/6014 (1965). This declaration was adopted by a vote of 109 to 0. Section 8 makes clear that the declaration does not affect the right of defense under Article 51 and everything else in chapters VI, VII and VIII of the Charter.

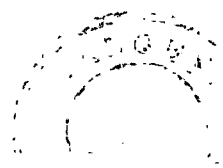
<sup>159</sup> GA Res. 2625, 25 UN GAOR Supp. (No. 28) at 121, UN Doc. A/8028 (1970). Similarly, this declaration makes clear that it does not affect "the relevant provisions of the Charter relating to the maintenance of international peace and security."

<sup>160</sup> Basic Principles of Relations between the United States of America and the Union of Soviet Socialist Republics, May 29, 1972, *reprinted in* 66 DEP'T ST. BULL. 898 (1972), 66 AJIL 920 (1972).

Soviet and Cuban support for insurgencies from Cuba would also seem to violate the Kennedy-Khrushchev agreement in the 1962 Cuban missile crisis that Kennedy believed to include Khrushchev's pledge that Cuba would not export subversion and revolution. *See, e.g., J. KIRKPATRICK, THE KENNEDY-KHRUSHCHEV PACT AND THE SANDINISTAS* 6 (1985).

<sup>161</sup> Principle IV prohibits "a threat or use of force against territorial integrity," and Principle VI prohibits "direct or indirect assistance to terrorist activities, or to subversive or other activities directed towards . . . violent overthrow." Conference on Security and Cooperation in Europe, Final Act, Aug. 1, 1975, *reprinted in* 14 ILM 1292 (1975). The "Helsinki Agreement" is signed by 35 nations and technically is regarded as creating political, rather than legal, obligations.

<sup>162</sup> For the Soviet draft definition of the attacking state, see text at note 180 *infra*. The draft also declares in part:



*The United States Response*

The Cuban-Nicaraguan secret war against neighboring states constitutes an armed attack justifying the use of force in collective defense under Article 51 of the UN Charter and Article 3 of the Rio Treaty. Article 51 provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations. . . ." Article 3 of the Rio Treaty incorporates this right into the inter-American system, declares that an attack against any American state—such as El Salvador—is an attack against all American states, including the United States, and goes beyond the Charter in creating a legal obligation on the United States and all other American state parties to assist in meeting the armed attack.<sup>163</sup> This obligation is parallel to that owed by the United States to NATO under Article 5 of the NATO Treaty in the event of an attack on a NATO member,<sup>164</sup> or under Article 5 of the Mutual Defense Treaty with Japan in the event of an attack on Japan.<sup>165</sup>

The right of individual and collective defense embodied in Article 51 of the Charter applies to secret or "indirect" armed attack as well as to open invasion. Many scholars, including Professors Bowett, McDougal and Stone, take the view that the Charter—and Article 51—was not intended to impair or restrict in any way the preexisting right of defense under customary law.<sup>166</sup> These scholars note that Article 51 was added to the Charter on the

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[T]he following may not be used as justifications for attack:

A. The internal position of any State, as, for example:

(b) Alleged shortcomings of its administration;

(d) Any revolutionary or counter-revolutionary movement, civil war, disorders or strikes;

(e) The establishment or maintenance in any State of any political, economic or social system. . . .

2 B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE* 79 (1975).

<sup>163</sup> Article 3(F) of the revised OAS Charter establishes the same legal point. For a general discussion of the inter-American system in relation to the UN Charter, see Claude, *The OAS, the UN, and the U.S.*, INT'L CONCILIATION, Mar. 1964, at 3; Moore, *The Role of Regional Arrangements in the Maintenance of World Order*, in 3 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* (C. Black & R. Falk eds. 1970), reprinted in J. MOORE, *LAW AND THE INDO-CHINA WAR* 296 (1972); see also Harter, *The Rio Treaty and Collective Security in Latin America*, FOREIGN SERVICE J., June 1985, at 35.

Article 27 of the revised OAS Charter also declares that an attack against one American state is "an act of aggression against . . . [all] the American States."

<sup>164</sup> Art. 5, North Atlantic Treaty Organization, Aug. 24, 1949, 63 Stat. 2241, TIAS No. 1964, 34 UNTS 243.

<sup>165</sup> Art. 5, Treaty of Mutual Cooperation and Security between the United States of America and Japan, 11 UST 1632, TIAS No. 4509, 373 UNTS 186.

<sup>166</sup> See, e.g., D. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 184-93 (1958); M. MCDUGAL & F. FELICIANO, *supra* note 1, at 233-41; J. STONE, *AGGRESSION AND WORLD ORDER* 92-101 (1958).

initiative of the Latin American states to protect regional security organizations and that there is absolutely no evidence in the *travaux préparatoires* that it was intended to narrow the customary right of defense. Under this view, the term "armed attack" in the English-language version of Article 51 is merely illustrative of the defensive right, and thus no question even arises whether "armed attack" excludes "indirect aggression." Given the unquestioned historical basis of the customary right of defense in the drafting of the Charter, the view that it is not impaired by the Charter—absent binding Security Council action—seems correct.

But even if a more restrictive view of the Charter is accepted—that the right of defense is limited as provided by Article 51—there is no doubt that Article 51 applies to secret or "indirect" armed attacks as well as to open invasion. The French version of Article 51 speaks of "*agression armée*" ("armed aggression"),<sup>167</sup> and this version is equally authentic with the English "armed attack." Moreover, neither "armed attack" nor "armed aggression" is limited by any language such as "direct," which could have been expected if the draftsmen had intended to exclude indirect attack. Rather, as we have seen, the *travaux* clearly show that Article 51 was designed to accommodate the Latin American interest in protecting the OAS system.<sup>168</sup> Thus, there is no evidence, in either the text or the *travaux*, that the draftsmen of Article 51 intended to narrow the customary right of defense.

As a policy matter, it would be surprising indeed if the draftsmen of the Charter had intended to prohibit states from defending themselves against a serious secret or indirect attack on their political integrity. The insulation of attacking states from a defensive response in such settings would be a formula for the destruction of the Charter. In terms of the important Charter goal of protecting self-determination, a serious covert attack against governmental and political institutions is the functional equivalent of an open invasion. No state can be expected to forgo its defensive right against such an attack aimed at the core of its national sovereignty. Seen in terms of important Charter goals of world order, a norm insulating the aggressors in such settings would encourage these attacks, which already gravely threaten world order, and would doom the victim—and the international system as a whole—to endless war. The seriousness of indirect aggression as a challenge to world order has been clearly flagged by McDougal and Feliciano in perhaps the best scholarly treatment of the use of force under the Charter system. They observe that "[t]he most serious problem confronting adherents to systems of world order . . . may thus be to devise appropriate procedures for identifying and countering unlawful attacks disguised as internal change."<sup>169</sup>

<sup>167</sup> "Aucune disposition de la présente ne porte atteinte au droit naturel de légitime défense, individuelle ou collective, dans le cas où un membre des Nations Unies est l'objet d'une agression armée, jusqu'à ce que le Conseil de Sécurité ait pris les mesures nécessaires pour maintenir la paix et la sécurité internationales." UN CHARTER art. 51.

<sup>168</sup> On the history of Article 51 in relation to Latin America, see Claude, *supra* note 163, at 8.

<sup>169</sup> M. McDougal & F. Feliciano, *supra* note 1, at 192 n.164.



Not surprisingly, even under the restrictive view of the right of defense, scholars and state practice have overwhelmingly supported the conclusion that serious and sustained assistance to insurgents is an armed attack and that Article 51 includes a right of defense against such an indirect attack. The abundant scholarly literature and state practice can only be briefly illustrated here. For example, Professor Kelsen writes:

Since the Charter of the UN does not define the term armed attack used in Article 51, the members of the UN exercising this right of individual or collective . . . defense, may interpret armed attack to mean not only an action in which a state uses its own armed forces but also a revolutionary movement which takes place in one state but which is initiated or supported by another state.<sup>170</sup>

According to Professors Thomas and Thomas, experts on the OAS system:

The force which should comprise "armed attack" . . . would include not only a direct use of force whereby a state operates through regular military units, but also an indirect use of force whereby a state operates through irregular groups or terrorists who are citizens but political dissidents of the victim nation. The Inter-American system has characterized such indirect use of force as internal aggression in that it includes the aiding or influencing by another government of hostile and illegal indirect attack against the established political order or government of another country. . . . Since it is usually an attack against the internal order through an attempt to overthrow or harass the victim government by promoting civil strife and internal upheaval or, once civil strife has commenced, by an attempt to take over the leadership of those in rebellion, it is a vicarious armed attack. . . . The victim state may exercise its right of individual self-defense against the aggressor state, and, of course, may act against the subversive groups within the country.<sup>171</sup>

Significantly, they add that

the OAS has labelled assistance by a state to a revolutionary group in another state for purposes of subversion as being aggression or intervention. If this subversive intervention culminates in an armed attack by the rebel group, it can be said that an armed attack as visualized by Article 3 of the Rio Treaty has occurred.<sup>172</sup>

Finally, Hull and Novogrod write:

the rapid development of the science of sabotage and terror, as well as the formulation of nationwide revolution, has led to a recognition that such means may be as competent as a military invasion in destroying the political independence of a state. . . . Quite obviously, indirect aggression can undermine the sovereignty of a state as effectively as a traditional armed attack. To argue that a state may not employ force to combat indirect aggression reveals a considerable lack of under-

<sup>170</sup> Kelsen, *Collective Security under International Law*, 49 INT'L L. STUD. 88 (1956).

<sup>171</sup> A. THOMAS & A. THOMAS, *THE DOMINICAN REPUBLIC CRISIS 1965: WORKING PAPER FROM THE NINTH HAMMARSKJÖLD FORUM* 27-28 (1967).

<sup>172</sup> *Id.* at 42.

standing of the purposes of the Charter. The drafters meant only to proscribe the unlawful use of force, not coercion in defense of such basic values as political independence or territorial integrity.<sup>173</sup>

During the Greek emergency in 1947, the United States regarded serious assistance to insurgents in Greece from Albania, Bulgaria and Yugoslavia as an armed attack.<sup>174</sup> During the Algerian War, France regarded assistance to Algerian insurgents from a Tunisian rebel base at Sakiet-Sidi-Youssef as an armed attack justifying a defensive response against the base.<sup>175</sup> During the 1958 Lebanon crises, the Lebanese delegate, in reserving his country's right to take defensive measures against alleged indirect aggression by the United Arab Republic, stressed to the Security Council that:

Article 51 does not speak of a direct armed attack. It speaks of armed attack, direct or indirect, so long as it is an armed attack. . . . [I]s there any difference from the point of view of the effects between direct armed attack or indirect armed attack if both of them are armed and if both of them are designed to menace the independence of a country?<sup>176</sup>

The record of U.S. Senate consideration of the NATO Treaty, which is based on Article 51 of the Charter and parallels the earlier Rio Treaty in its right to defense, reveals that "armed attack" may include external assistance to insurgents and is not limited to open invasion.<sup>177</sup> During the 1964

<sup>173</sup> R. HULL & J. NOVOGROD, *LAW AND VIETNAM* 118, 120 (1968). See also R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 204 (1963); C. POMPE, *AGGRESSIVE WAR: AN INTERNATIONAL CRIME* 53 (1953). Even Professor Brownlie, who takes one of the most restrictive views on indirect aggression, writes:

[I]t might be argued that "armed attack" in Article 51 of the Charter refers to trespass, a direct invasion, and not to activities described by some jurists as "indirect aggression". But providing there is control by the principal, the aggressor state, and an actual use of force by its agents, there is an armed attack.

I. BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 373 (1963).

<sup>174</sup> See, e.g., Tucker, *The Interpretation of War under Present International Law*, 4 INT'L L.Q. 11, 31 (1951).

<sup>175</sup> See R. HIGGINS, *supra* note 173, at 204 n.73.

<sup>176</sup> 13 UN SCOR (833d mtg.) at 3, UN Doc. S/PV.833 (1958).

<sup>177</sup> The following exchange occurred during hearings on the NATO Treaty:

Senator Fulbright: Would an internal revolution, perhaps aided and abetted by an outside state, in which armed force was being used in an attempt to drive the recognized government from power be deemed an "armed attack" within the meaning of article 5? That is a little different from the last question in that I assume an ordinary election which the Communists won. This is in the nature of a coup. Would that come within the definition of an armed attack?

Secretary Acheson: . . . Did you say if there were a revolution supported by outside force would we regard that as an armed attack?

Senator Fulbright: That is right. It is one of those borderline cases.

Secretary Acheson: I think it would be an armed attack.

*North Atlantic Treaty: Hearings Before the Senate Comm. on Foreign Relations, Pt. 1*, 81st Cong., 1st Sess. 58 (1949). See also S. EXEC. REP. NO. 8, 81st Cong., 1st Sess. 13 (1949).

Venezuelan emergency, the Ministers of Foreign Affairs of the Organization of American States adopted the view that serious indirect aggression could justify the use of force in defense under the United Nations and OAS Charters. In response to a Venezuelan request that they consider measures to be taken against Cuba for supporting subversive activities against Venezuela (activities comparable in kind but considerably less in intensity than those against El Salvador), the Ministers of Foreign Affairs adopted a resolution that concluded by warning the Government of Cuba

that if it should persist in carrying out acts that possess characteristics of aggression and intervention against one or more of the member states of the Organization, the member states shall preserve their essential rights as sovereign states by the use of self-defense in either individual or collective form, which could go so far as resort to armed force.<sup>178</sup>

Similarly, the United Nations Definition of Aggression unambiguously recognizes that aggression may include indirect aggression. Thus, Article 3(g) characterizes as acts of aggression "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above [invasion, military occupation, use of weapons, etc.], or its substantial involvement therein."<sup>179</sup>

Even the Soviet Draft Definition of Aggression says "that State shall be declared the attacker which *first* commits . . . [s]upport of armed bands . . . which invade the territory of another State, or refusal, on being requested by the invaded State, to take in its own territory any action within its power to deny such bands any aid or protection."<sup>180</sup>

As for fundamental community goals underlying the Charter, the requirement of "armed attack" under Article 51, like the requirement of "necessity" under customary law, is largely designed to restrict the right to the defensive use of intense coercion to situations that threaten fundamental values. By such verbal tests, contemporary international law establishes that minor encroachments on sovereignty, political disputes, frontier incidents, the use of noncoercive means of interference and, generally, aggression that does not threaten fundamental values such as territorial and political integrity may not be defended against by a major resort to force against another state.<sup>181</sup> But where a major military assault is made against such fundamental values as self-determination and political integrity, it is irrelevant whether that assault is indirect and denied or direct and acknowledged.

The secret Cuban-Nicaraguan attack against four neighboring states is

<sup>178</sup> Final Act, Ninth Meeting of Consultation of Ministers of Foreign Affairs Serving as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance, OEA/Ser.F/II.9 (Eng.), doc. 48, rev. 2 (1964), reprinted in 12 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 820 (1971). On this incident and the OAS response, see *id.* at 814-20.

<sup>179</sup> GA Res. 3314, *supra* note 154.

<sup>180</sup> B. FERENCZ, *supra* note 162, at 79 (emphasis added).

<sup>181</sup> On the community policies underlying the formulas "armed attack" and "necessity" as requirements of lawful defense, see M. MCDUGAL & F. FELICIANO, *supra* note 1, at 259.

not a minor border incident or political disagreement. Nor does it consist of overenthusiastic, but minor, assistance to an insurgent faction or even isolated acts of terrorism or subversion. It is an intense and sustained secret war employing sophisticated modern weapons and inflicting thousands of casualties in an all-out assault on governmental institutions and political integrity. It has resulted in over a billion dollars in damage to El Salvador alone and in the creation of refugees and social dislocation on a massive scale. It is being contained—but not yet ended—only by a major military buildup that is stifling the development hopes of states in the region. Its success would mean loss of self-determination for the attacked states and possibly even incorporation into a greater Nicaragua. It is being pursued by an alliance that used the same formulas to take control of Nicaragua and that has openly and repeatedly pledged forcibly to install like-minded governments in neighboring states. To treat such a setting as a non-“armed attack” or one lacking any “necessity” for response would be to ignore what may well be the most serious generic threat to the contemporary Charter system—the deliberate secret or “indirect” war against territorial and political integrity.

Under the Charter, a defensive response must be not only necessary but also proportional. McDougal and Feliciano state this requirement:

Proportionality in coercion constitutes a requirement that responding coercion be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense. . . . [T]hese objectives may be most comprehensively generalized as the conserving of important values by compelling the opposing participant to terminate the condition which necessitates responsive coercion.<sup>182</sup>

The values to be conserved in El Salvador and neighboring Central American states are among the most basic guaranteed to all states by the UN Charter: the rights to territorial integrity, political independence and self-determination. The Charter is not a suicide pact. It does not condemn an attacked state to perpetual attack but, instead, permits reasonable responsive coercion against the attacking state as necessary in defense. In this case, United States assistance to the contras—currently limited to nonlethal humanitarian aid—has been instrumental in reducing the level of that attack. It has certainly not been an unnecessary overreaction since the secret attack against El Salvador and neighboring states is continuing.<sup>183</sup> This defensive option may

<sup>182</sup> *Id.* at 242. The *Caroline* test, often erroneously employed as a general test for necessity and proportionality, is actually a test for the special case of anticipatory defense. *See id.* at 217, 231.

<sup>183</sup> In addition, the careful use of naval mines in response to an armed attack is not prohibited by general international law and may be a proportional response to assist in interdiction of the attack. Article 2 of the Hague Convention Relative to the Laying of Automatic Submarine Contact Mines (1907), 36 Stat. 2332, TS No. 541, clearly contemplates the use of mines for military objectives. As to proportionality in the Central American conflict, press accounts of the apparently small mines indicate considerably more casualties from a single FMLN attack on a mountain hamlet in El Salvador than from the entire “mining” operation. *Compare Ad-*

also offer less risk of escalation and a greater chance for negotiated settlement than other direct military responses. As Professor Thomas Franck has recently observed:

In counter-acting an insurgency organized and assisted substantially from another state, the victim state and its allies must respond in a fashion sufficiently effective to deter, yet not exceeding the limits of proportionality. In practical combat terms this may well argue for a strategy of assisted insurgency against the offending state, as an alternative to remedies which are either ineffective or which—as for example, is the case of large scale bombing—purchase effectiveness at a higher cost to innocent parties.<sup>184</sup>

Nothing could more quickly doom the Charter to irrelevance than to limit defensive options against serious armed attack solely to those of the least military and political effectiveness. Response solely within the attacked state leaves the military advantage with the attacker. An equivalent response in kind against the attacking state, however, shifts the military multiplier effect against the aggressor, permits direct action against weapons trans-shipment points and creates a persuasive incentive not to engage in an endless secret war.

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*ministration Defends Mining of Harbors*, CONG. Q., Apr. 1984, at 835, with *El Salvadoran Guerrillas Execute 18*, Wash. Post, May 13, 1985, at A1, cols. 2-4, A25.

Modern international law permits a belligerent to take reasonable measures (certainly within the internal waters of the opposing belligerent state) to restrict shipping, including third flag shipping, using the ports of the opposing belligerent. The Security Council supported this point by condemning Iran's general attacks against shipping in the Persian Gulf, whether or not it involved an Iraqi port, and pointedly not condemning Iraq's attacks against shipping, including third flag shipping, exclusively using Iranian ports. See SC Res. 552, 39 UN SCOR at 15, UN Doc. S/INF/40 (1984), and accompanying debate. During the debate, the Netherlands expressed the view that

under international law, belligerents may take measures to restrict shipping to and from ports of the other belligerents. Such measures did, of necessity, affect the rights of third States under whose flag such shipping was conducted. But indiscriminate attacks against merchant shipping in whatever part of the Gulf fell outside the scope of the permissible use of armed force.

See UN CHRON., No. 5, 1984, at 5, 8-9. The total number of ships hit by Iraq far exceeded that hit by the contras' mining. See UN Doc. S/16585 (1984). See also discussion at 39 UN SCOR (2525th mtg.) at 26-27, UN Doc. S/PV.2525 (1984).

Similarly, U.S. economic sanctions against Nicaragua are a proportional response against the secret attack. Both the General Agreement on Tariffs and Trade (GATT) and the U.S.-Nicaragua Treaty of Friendship, Commerce and Navigation include provisions permitting the suspension of obligations for "essential security interests" or if necessary for the "maintenance of international peace and security." Thus, general use-of-force issues and necessity and proportionality need not even be reached. See Art. XXI of the GATT, 61 Stat. (5), (6), TIAS No. 1700, 55-61 UNTS; Art. XXI (1)(d) of the Treaty of Friendship, Commerce and Navigation, *infra* note 203. For the U.S. position on the economic sanctions against Nicaragua of May 7, 1985, see Statement by L. Motley, DEP'T ST. BULL., No. 2100, July 1985, at 75. See also discussion by Ambassador Jose S. Sorzano, Acting U.S. Permanent Representative to the United Nations, in the Security Council on the complaint of Nicaragua, May 9, 1985, Press Release USUN No. 39(85) (rev.), May 9, 1985.

<sup>184</sup> Interview with Professor Thomas Franck, Oct. 30, 1984, quoted in Note, *A Framework for Evaluating the Legality of the United States Intervention in Nicaragua*, 17 N.Y.U.J. INT'L L. & POL. 155, 178 (1984).

Proportionality, correctly perceived, is not so much an exercise in matching levels of force between attacker and defender as, rather, a relation between lawful objectives in using force and the effective pursuit of those objectives in the way least destructive of other values. Nevertheless, a comparison of levels of force provides one contextual feature in assessing the proportionality of the response. In its attack against El Salvador and neighboring states, Nicaragua supplies command and control, training, funding, weapons and logistical assistance. It seeks the overthrow of the democratically elected Government of El Salvador, supports terrorism and efforts to destabilize three other neighboring states and does not suffer from any apparent constraints on its activities, other than a thoroughgoing effort at concealment.

The United States, in contrast, has not responded with bombing or invasion. Its defensive response has been in kind, but currently limited by law to assistance that is not directed to overthrowing the Sandinista Government and is exclusively humanitarian. Earlier, the United States was further constrained by a complete funds cutoff and prohibitions on submarine mining and on activities of defense and intelligence agencies. It is difficult to see how the considerably more restrained U.S. response against Nicaragua can be disproportionate to Nicaragua's determined and continuing attacks against four Central American states.

There is no prohibition under the Charter—apart from the general requirement of proportionality—against covert action as part of a defensive response to an armed attack. A response in defense may lawfully be overt, covert or—as in virtually every conflict in which the United States has fought in this century—both. In World Wars I and II and the Korean War, no one regarded Allied or UN support for paramilitary forces or covert operations as illegal. Lawrence of Arabia, to mention the most famous example, led a British covert operation in World War I to create an insurgency within the Ottoman Empire as part of the Allies' overall defensive response against the Central Powers. During World War II, the Allies created and aided insurgent movements in France, Belgium, the Netherlands, Norway, Yugoslavia, Greece and China, among other countries. In Italy support was given to partisans fighting the Germans and Italian Fascists. In Germany weapons and materials were supplied to Germans and foreign workers for acts of sabotage against the Nazi war effort.<sup>185</sup> The UN command itself sponsored guerrilla warfare against North Korea in response to that country's aggression in 1950–1953. With the approval of the high command, 44 teams of guerrillas were sent into North Korea to disrupt supply lines by attacking trains and truck convoys. All told, twelve hundred men were involved in this 2-year paramilitary effort against North Korea.<sup>186</sup> During Sukarno's secret war against Malaysia in the 1965 “confrontation,” the United Kingdom

<sup>185</sup> See J. PERSICO, *PIERCING THE REICH: THE PENETRATION OF NAZI GERMANY BY AMERICAN SECRET AGENTS DURING WORLD WAR II*, at 75, 255, 318 (1979). See also Special Operations Executive Directive for 1943, British Chief of Staff Memorandum of Mar. 20, 1943, *reprinted* in D. STAFFORD, *BRITISH AND EUROPEAN RESISTANCE 1940–45*, at 251 (1980).

<sup>186</sup> See J. GOULDEN, *KOREA: THE UNTOLD STORY OF THE WAR* 464–75 (1982); W. LEARY, *PERILOUS MISSIONS: CIVIL AIR TRANSPORT AND CIA COVERT OPERATIONS IN ASIA* 120–26 (1984).

provided not only direct assistance to Malaysia but also covert assistance to guerrilla and insurgent forces operating against Sukarno within Indonesia.<sup>187</sup>

The use of paramilitary forces as part of a defensive response is not unique to this century. In U.S. practice it dates at least to the presidency of Thomas Jefferson who provided arms, training and financial assistance to support an army of foreign nationals against the Bey of Tripoli as a means of ending attacks on commercial shipping in the Mediterranean. Such activities, when undertaken in defense against armed attack, have never been and are not now "state terrorism" or otherwise illegal. To make such a charge is to undermine the most important distinction in the United Nations and OAS Charters—that between aggression and defense. Moreover, the assistance to resistance forces in Nicaragua, as part of a broader defensive response against the Cuban-Nicaraguan armed attack, has been fully debated within Congress, the media and the UN Security Council and is not truly covert. The intelligence community describes such settings as "overt-covert."<sup>188</sup> As we have seen, efforts to seek the peaceful settlement of disputes and to avoid escalation may make such an "overt-covert" response preferable.

The United States has not violated Articles 18 and 20 of the OAS Charter (revised in 1967) on nonintervention. Article 22 of the Charter specifically states that "measures adopted for the maintenance of peace and security in accordance with existing treaties"—in this case, Article 3 of the Rio Treaty—"do not constitute a violation of the precepts set forth in Articles 18 and 20." Under Article 21, the "American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense." Articles 27, 28 and 137 support the same legal point: that actions in defense under the Rio Treaty and the UN Charter are not illegal. Similarly, states faced with an armed attack are not obliged to invoke the procedural machinery of the OAS before responding. As with Article 51 of the UN Charter, Article 3 of the OAS Charter permits an immediate and continuing response against armed attack *until the procedural machinery of the UN or OAS systems concludes otherwise*.<sup>189</sup> Some have confused the pro-

<sup>187</sup> Conversation of the author with William Stevenson, author and expert on the history of intelligence, in Washington, D.C. (1985).

<sup>188</sup> See Remarks by Senator David Durenberger to the Johns Hopkins University School of Advanced International Studies (Oct. 21, 1985).

<sup>189</sup> See revised OAS Charter, *supra* note 152. For the operation of this principle under the UN Charter, see, e.g., D. BOWETT, *supra* note 166, at 195; J. BRIERLY, *THE LAW OF NATIONS* 319-20 (5th ed. 1955); P. JESSUP, *A MODERN LAW OF NATIONS* 64-65, 202 (1948); H. Kelsen, *THE LAW OF THE UNITED NATIONS* 800, 804 n.5 (1964); J. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 244 (1954).

Article 51 does require that defensive measures be brought to the attention of the Security Council, but the United States has repeatedly discussed the Central American conflict in the Council. See particularly for a discussion of the legal issues, the material by U.S. Ambassador Sorzano, Press Release USUN No. 39(85)(rev.), *supra* note 183. Even if the formalistic argument were made that repeated discussion before the Council does not constitute "reporting"—in the English version of Article 51—an absence of reporting could not vitiate the right of defense under customary law, which is embodied in the Charter and acknowledged by the same article that calls for reporting as "inherent" and not subject to impairment by anything "in the present Charter." Furthermore, the equally authentic French text of Article 51 uses the phrase "portées à la connaissance du Conseil" and speaks of a "droit naturel de légitime défense."

cedural requirements of Article 6 of the Rio Treaty, which apply to settings other than armed attacks, with those of Article 3, which govern here.<sup>190</sup>

The United States also has not violated any national law concerning the use of force, such as the War Powers Resolution, the neutrality acts and the Boland amendment. Despite the invocation of these national laws in the usual polemics surrounding any war/peace issue, there is no serious scholarly opinion to the contrary. The War Powers Resolution<sup>191</sup> applies to the introduction of U.S. armed forces "into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances; . . . into the territory, airspace or waters of a foreign nation, while equipped for combat . . . ; or . . . in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation."<sup>192</sup> It does not apply to assistance to foreign political or military forces, and during debate in the Senate it was recognized that the resolution did not apply to activities of the intelligence community. The neutrality acts<sup>193</sup> do not apply to governmentally authorized assistance in collective defense against an armed attack.<sup>194</sup> Even if they did, they would be superseded by subsequent statutory authorization for "special activities" in general, and for funding the contras in particular.<sup>195</sup> The Boland amendment, which

<sup>190</sup> This issue will be discussed in greater detail in section IV of this paper.

<sup>191</sup> Pub. L. No. 93-148, §5, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§1541-1548 (1982)). Following the Supreme Court decision in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), §5(c) of the resolution is almost certainly unconstitutional. There is an ongoing controversy as to whether §5(b), or the resolution more broadly, is also unconstitutional. See, e.g., the exchange between Moore & Tipson, *The War Powers Resolution*, 70 A.B.A.J. 10 (1984).

<sup>192</sup> Section 4 of the War Powers Resolution, *supra* note 191.

<sup>193</sup> 18 U.S.C. §960 (1982). An Act of 1794—growing out of the notorious "Citizen Genêt affair"—was passed at the request of President Washington to prevent unauthorized involvement by private citizens in the war between France and England. Similarly, in 1917 during World War I, a "neutrality" Act was passed that, among other things, prohibits *individual citizens* from engaging in a conspiracy to destroy property situated abroad of a foreign government with which the United States is at peace. 18 U.S.C. §956 (1982). A series of neutrality acts—dealing with such issues as munitions sales and exports—was also passed in the 1930s, as some in Congress sought to avoid the coming global war and, instead, by their isolationism, actually fanned the flames. See, e.g., all by Jessup, *New Neutrality Legislation*, 29 AJIL 665 (1935); *Toward Further Neutrality Legislation*, 30 AJIL 262 (1936); *Neutrality Legislation—1937*, 31 AJIL 306 (1937); and *Reconsideration of the Neutrality Legislation*, 33 AJIL 549 (1939).

<sup>194</sup> The legislative intent and background of the relevant neutrality acts preclude such application. See *United States v. Elliott*, 266 F.Supp. 318, 324 (S.D.N.Y. 1967) (interpreting the 1917 Act). The Circuit Court case *United States v. Smith*, 27 F. Cas. 1192 (D.N.Y. 1806) (Nos. 16,342 and 16,342a), much cited for the contrary proposition, is not good authority for that proposition. There, defendants under the 1794 Act sought to rely on imputed presidential knowledge of their actions and presidential silence toward them rather than on presidential authorization of those actions.

<sup>195</sup> Even if the neutrality acts were broad enough to apply to governmentally authorized assistance, under hornbook rules of U.S. constitutional law they would yield to subsequent and inconsistent acts of Congress or treaties. Such acts and treaties would include, as applied to assisting the contras, the National Security Act of 1947, as amended, particularly 50 U.S.C. §403(d)(5) and 50 U.S.C. §413 (1982) (accountability for intelligence activities), 22 U.S.C. §2422 of 1974, as amended October 1980 (Hughes-Ryan amendment), individual intelligence authorization and appropriation measures related to funding the contras, and even Article 3 of the Rio Treaty.



prohibits U.S. assistance to the "democratic resistance" forces for purposes of overthrowing the Sandinista Government, nonetheless permits U.S. assistance to such forces for the collective defense of Central American states. Indeed, the House's adoption of the Boland amendment followed the rejection of a proposal to deny funds for the purpose of carrying out military activities in or against Nicaragua and a second proposal to deny funds to groups or individuals known by the United States to intend to overthrow the Government of Nicaragua.<sup>196</sup> The clear intent of Congress, like that of the administration, was that the United States should limit its response against Nicaragua to actions necessary and proportional to a hemispheric defense against the ongoing secret attack.<sup>197</sup>

### *The Peace Palace Goes to War*

On April 9, 1984, Nicaragua instituted proceedings before the International Court of Justice alleging that the United States was unlawfully using force against Nicaragua and intervening in its internal affairs.<sup>198</sup> The complaint, which precipitated a highly visible dispute in the United States about providing assistance to the contras for the small-scale mining of Nicaraguan harbors, was a propaganda coup. On May 10, 1984, the Court decided in a provisional order that the United States "should immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports" and that "[t]he right to sovereignty and to political

<sup>196</sup> See note 117 *supra*. See also H.R. REP. NO. 122, *supra* note 70, at 25-26.

<sup>197</sup> As of this writing, there have been five cases before United States District Courts in which plaintiffs have challenged U.S. activities in Central America. In *Crockett v. Reagan*, 720 F.2d 1355, 1356-57 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 3533 (1984), the court held that such questions present "nonjusticiable" political questions. In *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), the court of appeals reaffirmed this holding in regard to a contention by members of Congress that the administration's activities in Central America had violated the Boland amendment and Article I, section 8 of the Constitution, which gives Congress the power to declare war. "Without necessarily disapproving the District Court's conclusion that all aspects of the . . . case present[ed] a nonjusticiable political question," the court dismissed the claims of the other litigants, several Nicaraguan and U.S. citizens, on the ground that they did not have a private right of action under the War Powers Resolution, the Hughes-Ryan amendment, the National Security Act or the neutrality acts. *Id.* at 206. Even *Dellums v. Smith*, 573 F.Supp. 1489 (N.D. Cal. 1983), which is widely cited by opponents of U.S. policy in Central America, only held that, under the extraordinarily loose standard of the Ethics in Government Act, 28 U.S.C. §§591-598 (1982), a special prosecutor should have been appointed by the Department of Justice to determine the truth or falsity of plaintiff's allegations based on the neutrality acts. Since the Attorney General has already determined that the acts are not violated by U.S. activities in Central America, the Government rightly regarded the decision as silly. The case is on appeal and almost certainly will be reversed. See also *Clark v. United States*, 609 F.Supp. 1249 (D. Md. 1985) (taxpayers lacked standing to challenge provision of Foreign Assistance Act that authorizes assistance to El Salvador and to Nicaraguans opposing the Sandinista regime). Of peripheral relevance, see *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984), *vacated*, 105 S.Ct. 2353 (1985) (U.S. citizen suing for unlawful taking of property in Honduras for military base used by U.S. troops).

<sup>198</sup> It is not generally known that the Nicaraguan complaint, announced at a press conference in Washington, D.C., sought, among its many objectives, to terminate any presence of American military advisers in El Salvador.

independence . . . of Nicaragua . . . should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law."<sup>199</sup> On November 26, the Court decided that it had jurisdiction on the merits in a decision that, in its most important dimension, was decided by 11 votes to 5.<sup>200</sup> After a careful review, the United States subsequently announced that "[w]ith great reluctance, [it] has decided not to participate in further proceedings in this case."<sup>201</sup>

Once the Court decided to go forward to the merits, I believe the United States would have been better advised to pursue the proceedings. U.S. withdrawal could only hand the Sandinistas a propaganda windfall by further confusing world opinion about the Cuban-Nicaraguan secret war against neighboring states. As a special counsel for the United States in the *Nicaragua* case, I am convinced that Nicaragua's principal objective in going to the Court was to reap a propaganda victory and to move away from genuine multifaceted regional negotiations. The complaint, for example, was announced at a news conference in Washington shortly before a major congressional vote on funding the contras.

Nevertheless, there are at least three reasons why the Court should dismiss the *Nicaragua* case. The first one justifies—as a matter of law—the U.S. decision not to go forward on the merits.<sup>202</sup>

That reason is that, in deciding to proceed to the merits, the Court stretched its own jurisdiction beyond the breaking point. Jurisdiction based on the Treaty of Friendship, Commerce and Navigation with Nicaragua is

<sup>199</sup> Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Request for Provisional Measures, 1984 ICJ REP. 169, para. 41(B)(1) and (2) (Order of May 10), *reprinted in* 23 ILM 468, 477 (1984).

<sup>200</sup> Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Judgment of Nov. 26), *reprinted in* 24 ILM 59 (1985). The Court held by 11-5 that it had jurisdiction under the "optional clause" and by 14-2 that it had jurisdiction under the U.S.-Nicaragua Treaty of Friendship, Commerce and Navigation, *infra* note 203.

<sup>201</sup> See Dep't of State, Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, Jan. 18, 1985, *reprinted in* 24 ILM 246 (1985) [hereinafter cited as Statement on Withdrawal].

<sup>202</sup> This conclusion specifically does *not* rely on the following facts: that only 44 nations out of more than 160 UN members have accepted the compulsory jurisdiction of the Court under the "optional clause," and of those many have substantial reservations; that only the United States and the United Kingdom among permanent members of the Security Council have accepted "optional clause" jurisdiction; that only 5 out of 16 judges in the *Nicaragua* case come from countries that have accepted the compulsory jurisdiction of the Court; that the United States is the only country to have agreed to appear in a hearing on provisional measures when it disputed the jurisdiction of the Court (among others, France, Iran and Iceland did not appear). However, as the United States assesses its acceptance of compulsory jurisdiction in the aftermath of the *Nicaragua* case, these factors, as well as the obvious deficiencies in the existing U.S. acceptance of the Court's jurisdiction such as the Connally reservation and lack of protection against the "hit-and-run problem," will be relevant. See, e.g., D'Amato, *Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court*, 79 AJIL 385 (1985). See also the papers and proceedings of the conference on U.S. acceptance of the ICJ's compulsory jurisdiction at the University of Virginia (Aug. 17, 1985) (forthcoming).

simply untenable, given the national security exception in that Treaty and its clear subjection to the UN and OAS Charters' right of defense.<sup>203</sup> In fact, jurisdiction on such a basis is so weak that Nicaragua did not even suggest it during oral argument. One can imagine that a majority of the Court might feel that this bilateral Treaty provides a technical basis for proceeding to the merits phase, but once at the merits phase this basis for jurisdiction clearly disappears because of the national security exception and the Treaty's irrelevance in a use-of-force setting governed by the UN and OAS Charters. Furthermore, if the Court has no jurisdiction to decide the case on the basis of the UN and OAS Charters, the parties' fundamental treaty obligations concerning a use-of-force setting, it would be the height of absurdity to seek to apply a treaty of friendship, commerce and navigation as the normative basis for determining the rights of the parties under international law.

Similarly, there are at least two quite compelling reasons why the Court lacks jurisdiction under the "optional clause." The first of these is the so-called Vandenberg or multilateral treaty reservation to the U.S. acceptance of jurisdiction under that clause. The reservation specifically excludes from the Court's jurisdiction "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction."<sup>204</sup> Nothing could have been clearer than that other key and substantially affected parties to the United Nations and OAS Charters, particularly El Salvador, on whose behalf the United States was acting in collective defense, were not "parties to the case before the Court," as required by even the most restrictive interpretation of that reservation.<sup>205</sup> The Court had earlier summarily rejected El Salvador's Application to Intervene at the jurisdictional phase—without even allowing El Salvador a hearing.

Only two thoughtful interpretations of the multilateral treaty reservation had been put forward prior to the Court's decision. The first, a view held contemporaneously with the reservation's adoption by Judge Manley O.

<sup>203</sup> See Art. XXIV, para. 2, Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, United States-Nicaragua, 9 UST 449, TIAS No. 4024. Although by its terms disputes arising under the Treaty may be submitted to the ICJ, it is so patent on its face that the Treaty could not form the basis for deciding the *Nicaragua* case that it is an abuse of discretion to hold that the Treaty provides an independent basis of jurisdiction. The Treaty applies to U.S. actions with respect to Nicaraguans in the United States, not to U.S. actions in Nicaragua. It contains a clear national security exception (Article XXI(1)(d)) that provides: "The present Treaty shall not preclude the application of measures . . . [that are] (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests. . . ." Most importantly, the fundamental right of defense is based on Article 51 of the UN Charter and Article 3 of the OAS Charter, which clearly supersede an FCN treaty for conflict settings.

The Court's extraordinary interpretation of FCN treaties may severely harm international relations—and the Court—by convincing nations that they must modify either all these treaties or their acceptance of ICJ compulsory jurisdiction under them, quite apart from their acceptance of jurisdiction under the optional clause.

<sup>204</sup> 61 Stat. 1218, TIAS No. 1598.

<sup>205</sup> For El Salvador's stake in the case, see El Salvador's Declaration of Intervention, *supra* note 77.

stantial manner passed beyond the terms of submission, express or implied."<sup>214</sup> The legal effect of a void judgment is to absolve the state of any responsibilities dictated by the tribunal's order.<sup>215</sup>

Some writers have maintained that this rule conflicts with the right of tribunals, as codified for the ICJ in Article 36(6), to decide questions concerning their jurisdiction.<sup>216</sup> Others hold a view that seems to me applicable to the Court if the important first five paragraphs of Article 36 are to have any legal effect. Thus, Simpson and Fox write:

It is sometimes suggested that there is a conflict between the rule that a tribunal has jurisdiction to decide its jurisdiction and the rule that an award given in excess of jurisdiction is void. . . . The rule that a tribunal has jurisdiction to decide its jurisdiction . . . does not mean its decision is conclusive. There is no conflict between the two rules; the first rule has to be read as subject to the second.<sup>217</sup>

To guard against abuse by losing states, the standard for refusing to obey an award on grounds of *excès de pouvoir* is strict:

The departure from the terms of submission should be clear to justify the disregarding of the decision. Claims of nullity should not captiously be raised. Writers who have given special study to the problem of nullity are agreed that the violation of the *compromis* should be so manifest as to be readily established.<sup>218</sup>

That standard is clearly met here. As was previously noted, even members of the International Court itself have labeled the Court's claimed basis of jurisdiction as "untenable" and "astonishing."<sup>219</sup>

The right to ignore rulings manifestly made in excess of a tribunal's jurisdiction is an independent right of sovereign states grounded in the important principle that the jurisdiction of international courts is derived from the consent of the parties. As such, it is applicable to rulings of the International Court of Justice, as it would be to those of any other international tribunal. Moreover, nothing could more quickly and thoroughly destroy the Court than the loss by nations of confidence that the Court was strictly adhering to its jurisdiction. A rule that makes a legal reality of the careful observation of jurisdictional limits by the Court seems crucial to its long-term healthy functioning. As Judge Lauterpacht has noted:

The right of States to refuse to submit disputes with other States to judicial settlement is, subject to obligations expressly undertaken, un-

<sup>214</sup> K. CARLSTON, *supra* note 213, at 87.

<sup>215</sup> Effect of awards of compensation made by the U.N. Administrative Tribunal, 1954 ICJ REP. 47, 65 (Advisory Opinion of July 13) (indiv. op. Winiarski, J.).

<sup>216</sup> See, e.g., I. SHIHATA, *supra* note 213, at 73.

<sup>217</sup> I. SIMPSON & H. FOX, *supra* note 213, at 252. See also C. ROUSSEAU, *supra* note 213, at 496-97.

<sup>218</sup> K. CARLSTON, *supra* note 213, at 87.

<sup>219</sup> See *supra* notes 210 and 211. At least one distinguished law scholar, Professor Michael Reisman of the Yale Law School, has taken the position that the Court's claimed jurisdiction in the *Nicaragua* case is an *excès de pouvoir*. See *Has the International Court Exceeded its Jurisdiction?*, *infra* at p. 128.

doubted. They are entitled to regard any deliberate extension of jurisdiction on the part of courts, in excess of the power expressly conferred upon them, as a breach of trust and abuse of powers, justifying a refusal to recognize the validity of the decision. So long as the jurisdiction of international courts is optional, the confidence of States, not only in the impartiality of these tribunals as between the disputants, but also in regard to the use of the powers conferred upon them, is one of the essential conditions of effective judicial settlement.<sup>220</sup>

It should also be noted that the doctrine of *excès de pouvoir* developed simultaneously with another rule of customary law, that an international tribunal has the power to determine its own jurisdiction even if its constituent instrument does not specifically confer such power.<sup>221</sup> Thus, the International Court of Justice would have this power even if there were no Article 36(6).<sup>222</sup> Codification of this power in the Statute simply made explicit a rule of customary international law. Neither reasons of policy, nor the *travaux préparatoires* of Article 36(6) nor the language of Article 36 suggests that the explicit inclusion of this customary power to decide jurisdiction in the Court's Statute excludes the customary law doctrine of *excès de pouvoir*, which co-existed with it.

The Court has not dealt directly with *excès de pouvoir* as it applies to the Court itself.<sup>223</sup> An individual opinion in the *UN Administrative Tribunal* case,

<sup>220</sup> H. LAUTERPACHT, *supra* note 213, at 210.

<sup>221</sup> As the ICJ has expressed it:

Paragraph 6 of Article 36 merely adopted, in respect of the Court, a rule consistently accepted by general international law in the matter of international arbitration. . . . [I]t has been generally recognized . . . that, in the absence of any agreement to the contrary, an international tribunal has the right to determine its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction. . . . This principle, which is accepted by general international law in the matter of arbitration, assumes particular force when the international tribunal is . . . an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation, and is, in the present case, the principal judicial organ of the United Nations.

*Nottebohm Case (Liechtenstein v. Guat.)*, 1953 ICJ REP. 111, 119 (Judgment of Nov. 18). On the development of this rule, see I S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 438-41 (1965); and C. ROUSSEAU, *supra* note 213, at 496-97.

<sup>222</sup> As stated in the *Nottebohm* case:

Article 36, paragraph 6, suffices to invest the [ICJ] with power to adjudicate on its jurisdiction in the present case. But even if this were not the case, the Court "whose function is to decide in accordance with international law such disputes as are submitted to it" (Article 38, paragraph 1, of the Statute), should follow in this connection what is laid down by general international law. The judicial character of the Court and the rule of general international law referred to above [the right of international tribunals to decide their own jurisdiction] are sufficient to establish that the Court is competent to adjudicate on its own jurisdiction in the present case.

1953 ICJ REP. at 120.

<sup>223</sup> On several occasions, the Court has discussed its competence to determine its own jurisdiction under Article 36(6), the most extensive being in the *Nottebohm* case. See *supra* notes 221 and 222. There, the Court rejected Guatemala's argument that its powers under Article 36(6) were limited to determining whether a claim fell within the categories enumerated in Article

however, which dealt with the right of the General Assembly to refuse to give effect to the Administrative Tribunal's award to a UN employee, did discuss one of the reasons often cited for not applying the doctrine to the Court. Judge Winiarski noted that the lack of a procedure for appealing an award does not block a state from disregarding a void award:

An arbitral award, which is always final and without appeal, may be vitiated by defects which make it void; in this event, a party to the arbitration will be justified in refusing to give effect to it. . . . The view that it is only possible for a party to rely on the rule relating to nullities where some procedure for this purpose is established, finds no support in international law. . . . [T]he absence of an organized procedure does not do away with nullities, and there is no warrant for the idea that there can be no nullity if there is no appropriate court to take cognizance of it.<sup>224</sup>

It should never be forgotten that decisions about jurisdiction are as crucial a part of the international rule of law as decisions on the merits—perhaps even more so, in terms of the Court's functioning as a constitutive international legal institution.

One other problem also seems to be a jurisdictional one, at least with respect to the Court's ability to issue either a provisional or a final order interfering with the right of defense against an ongoing armed attack. Article 51 of the UN Charter provides that "[n]othing in the present Charter shall impair the inherent right of . . . defence if an armed attack occurs." Charter Article 92 makes the Statute of the Court "an integral part" of the Charter. Thus, nothing in the Statute of the Court, as well as in the rest of the Charter, can lawfully serve as the basis for impairing the inherent right of collective defense against an ongoing armed attack, and the Court cannot lawfully issue an order impairing this right. Moreover, if a final order of the Court interfering with this right would be void, it is particularly puzzling how a provisional order—made under the Court's Rules without a determination of the facts and thus without the crucial determination of who is attacking and who is defending—could have any but accidental validity. That, however, is precisely how the Court's provisional order in the *Nicaragua* case was made.

The second reason why the *Nicaragua* case should be dismissed is that, whether or not the Court has jurisdiction, it should abstain from exercising jurisdiction under its own doctrine of "admissibility." As with the multilateral treaty reservation, the Court seems not yet to have definitively resolved the admissibility issue and has joined it to the merits phase.<sup>225</sup> The doctrine of admissibility embodies various principles concerned with protecting the rule

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36(2) and affirmed its power to decide whether the expiration of Guatemala's acceptance of compulsory jurisdiction deprived it of the power to hear the case. 1953 ICJ REP. at 120. However, while this and other opinions clearly establish the power of the Court to decide its jurisdiction *in the first instance*, they do not deal with the present proposition, that its determination is not final and binding when states can demonstrate a manifest *excès de pouvoir* on its part.

<sup>224</sup> 1954 ICJ REP. at 65.

<sup>225</sup> See 1984 ICJ REP. at 429–41.

of law and the integrity of the judicial role and process.<sup>226</sup> Most importantly in this case, to go forward in the absence of El Salvador and other states attacked by Nicaragua would prejudice the legal rights of those absent states; to go forward in the absence of Cuba, one of the attacking states, would be an exercise in futility; to adjudicate solely the issues of concern to Nicaragua could severely undercut the balanced effort under the Contadora process to address the concerns of all nations in the region; and to adjudicate a use of force while the conflict is continuing would exceed the limits of the Court's ability in fact-finding and the fashioning of appropriate relief.

Judge Nagendra Singh was surely correct when he wrote in the 1973 *Pakistani Prisoners of War* case:

It is indeed an elementary and basic principle of judicial propriety which governs the exercise of the judicial function, particularly in inter-State disputes, that no court of law can adjudicate on the rights and responsibilities of a third State (a) without giving that State a hearing, and (b) without obtaining its clear consent.<sup>227</sup>

Yet, as with many such problems in the *Nicaragua* case, how can the right of the United States to respond in the collective defense of El Salvador and neighboring Central American states possibly be adjudicated without affecting the even more important right of those states to request assistance? To argue that their rights are not involved because this case is simply between Nicaragua and the United States is a legal fiction sufficient even to startle Mr. Bumble.<sup>228</sup>

Similarly, I believe the Court would find it extremely difficult to find adequate facts during ongoing hostilities.<sup>229</sup> The best proof of that proposition is the audacity of Nicaragua in filing a case before the Court to halt a defensive response to its secret and ongoing war against neighboring states. In addition, is it appropriate to decide the facts when the principally attacked states, critical to any serious factual determination, are not before the Court? Even if the facts were determined, how could the Court fashion appropriate relief during an ongoing war? To point out one dilemma: suppose that if

<sup>226</sup> For a more complete development of this point, see Oral Argument of John Norton Moore, Inadmissibility of the Application, presented by the United States in Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*) (Oct. 16, 1984).

<sup>227</sup> Trial of Pakistani Prisoners of War, Interim Protection, 1973 ICJ REP. 328, 332 (Order of July 13) (sep. op. Nagendra Singh, J.).

<sup>228</sup> See C. DICKENS, *OLIVER TWIST*, ch. 51 (1837).

<sup>229</sup> Among others, Judge Hardy Dillard, formerly of the ICJ, and Lloyd Cutler have recognized the inherent limitations on adjudication by the Court. See Dillard, *Reflections of a Professor Turned Judge*, 17 WILLAMETTE L. REV. 24 (1980). Cutler made the following points on the *Nicaragua* case:

How would the World Court go about making judicial findings of fact in the *Nicaragua* case? Is it going to subpoena the files of the CIA, or its opposite number in Nicaragua? Is it going to make on-site inspection visits to the guerrilla camps in El Salvador, or Honduras, or Nicaragua itself? I submit that the U.N. Charter had good reason to consign issues like these to the Security Council. They are simply not justiciable.

78 ASIL PROC. (1984) (forthcoming). See also Cutler, *Some Reflections on the Adjudication of the Iranian and Nicaraguan Cases*, 25 VA. J. INT'L L. 437 (1985) [hereinafter cited as *Reflections*].

after a Court order of cessation of assistance to the contras, Cuba and Nicaragua were to escalate their armed attack against neighboring states. Or, as previously discussed, how can the Court issue a preliminary order when one side is acting under its nonimpairable defensive right<sup>230</sup> and in a preliminary hearing no findings of fact have been made? Yet the Court did so in its Order of May 10, 1984,<sup>231</sup> which, I believe, will some day be regarded as one of the greatest failures of adjudication in history: a preliminary judicial order—though ambiguous—that actually gives assistance to a nation engaged in an ongoing armed attack against its neighbors! To the extent that the preliminary order does “impair the inherent right” of defense, under Articles 51 and 92 of the Charter it is void. Nonetheless, the United States seems to have complied with the Order by ending assistance for small-scale mining of Nicaraguan ports despite this substantial doubt as to the Order’s legal efficacy.<sup>232</sup> Ironically, Nicaraguan assistance in the indiscriminate (and undisclosed) mining of roads in El Salvador—which has resulted in far more casualties than the mining of Nicaraguan ports—seems to have been escalated since the Court’s Order.

The third reason for dismissal is that, by undertaking adjudication at the behest of a state that is engaged in an armed attack on its neighbors and in sworn affidavits to the Court seems to be departing from known facts about its activities, even while that conflict continues, the Court is severely risking both its own integrity and the rule of law. Moreover, if the charges of the former chief investigator of the Nicaraguan Interior Ministry are true, Nicaragua’s principal official witness before the Court, Interior Vice-Minister Luis Carrión, may be personally responsible for ordering hundreds of secret assassinations of political opponents of the Sandinista regime.<sup>233</sup>

Former presidential counsel Lloyd Cutler has recently written that “the ICJ’s actions in the *Nicaraguan* case to date, and its apparent intention to decide the legal and factual merits and to order appropriate relief, are likely to reverse the trend in this century towards greater recourse to law as a means of settling international disputes.”<sup>234</sup> I profoundly hope that Lloyd

<sup>230</sup> Article 51 of the Charter says, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense,” and under its Article 92 the Statute of the Court “forms an integral part of the present Charter.”

<sup>231</sup> 1984 ICJ REP. 169.

<sup>232</sup> Scholars, of course, also disagree as to whether provisional measures in general are legally binding or enforceable by the Security Council. See J. SZTUCKI, *INTERIM MEASURES IN THE HAGUE COURT* 260–98 (1983).

<sup>233</sup> See text *infra* at note 317.

One example of misreporting by counsel for Nicaragua is the statement made to the Court by Abram Chayes on Sept. 18, 1985 that “Ronald F. Lehman, a Special Assistant to the President, and I believe, brother to the Secretary of the Navy, visited FDN leadership in Nicaragua in the spring of 1984. . . .” Ronald Lehman, senior director for arms control on the National Security Council staff and currently an ambassador to the Geneva arms control talks, does not work on Central American issues, has never been to Central America and is not related to Secretary of the Navy John Lehman. This disregard of normal standards of care in making factual assertions to the Court shows a troubling lack of concern for its integrity. See CR 85/24, at 61 (Sept. 18).

<sup>234</sup> See Cutler, *Reflections*, *supra* note 229, at 446.



Cutler is wrong, but all signs to date suggest that he is right. The comandantes and other radical regimes have little to lose if the rule of law, which they do not respect, loses a great institution. For the democracies, however, which have worked for a century to build up effective international adjudication, any diminishing of the Court is a tragedy.

#### IV. RECURRENT MISPERCEPTIONS

Quite a few factual and legal misperceptions about the Central American conflict occur with sufficient frequency to deserve separate comment. These can be characterized as: the "invisible attack" syndrome, the anemic right of defense, the comandantes (and FMLN) as "aggrieved plaintiffs," the alleged "American Brezhnev Doctrine" and misrepresentation of human rights issues in the conflict.

##### *The Invisible Attack*

One of the most dangerous aspects of clandestine attacks by radical regimes using terrorism and insurgency is that such attacks may be broadly treated internationally as politically nonexistent. Through the use of sophisticated covert means, a major politico-military threat can be created without receiving much more public attention than the everyday global background noise of terrorist incidents and guerrilla activity. The principal sources of information about such secret attacks are the intelligence services of the victimized governments, which are constrained both by the need to protect sources and methods and by the inherent skepticism of democracies toward government pronouncements. Thus, a determined armed attack may in effect be "invisible" to the broad public even if occasional news stories remove the clandestine cloak. The sponsors of such attacks support them through incessant propaganda and effective political action coordinated with a sympathetic network of radical regimes and "solidarity committees." The sponsors thus succeed in focusing attention on alleged (and, in some cases, quite real) political or human rights shortcomings of the attacked entity and on the permissibility of any defensive response. The impact on world order is devastating, as the great principle of the Kellogg-Briand Pact and the UN and OAS Charters is turned upside down. Armed aggression becomes politically invisible; armed response to that aggression is transmogrified into the condemned armed attack. It is as though the immune system of international law had gone haywire and begun methodically to attack defensive response while ignoring the virus of aggression.

The secret war in Central America presents a chilling example. A Sandinista radical leadership that systematically participates in full-scale covert armed attack against one of its neighbors and in terrorism and subversion against at least three others—and does so despite major efforts at good relations and massive economic assistance from the democracies—lies about its covert activities<sup>235</sup> and goes to the World Court to seek to halt the defensive

<sup>235</sup> On the sixth anniversary of the Sandinista overthrow of Somoza, July 19, 1985, and following an FMLN attack on off-duty American Marines and Salvadoran civilians in a downtown San Salvador cafe, Comandante Ortega again denied that Nicaragua was engaged in terrorism

response. The international community, only vaguely aware of the extent of the attack, reacts with indignation at the highly publicized defensive response.<sup>236</sup> Like the immune system gone haywire, the reaction is vigorous, but the target has been converted from the attack into the response.<sup>237</sup>

Few who have seriously reviewed the evidence—from the attacked Governments of Central America to the congressional intelligence oversight committees and the bipartisan Kissinger Commission—doubt that the root of the world-order problem in Central America is a serious, ongoing secret war directed from Cuba and Nicaragua against neighboring states, particularly El Salvador. The contra response is just that: an effort by the democracies to defend against that attack and to create a meaningful incentive for the perpetrators to stop.

### *The Anemic Right to Defense*

A recurrent misperception that frequently accompanies the “invisible attack” syndrome results from defining the right of defense so narrowly as effectively to destroy it. In this connection, three arguments are most frequently advanced in the Central American context: first, that no defensive response may be undertaken against the attacking state until the Organization of American States has authorized such action; second, that any defensive response must be confined to the territory of the attacked state; and third,

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against its neighbors and vehemently accused the United States of terrorism on a worldwide basis. See Long, *Ortega Marks Sandinista Revolution's Anniversary with Denunciation of U.S.*, Los Angeles Times, July 20, 1985, at 9, col. 1.

<sup>236</sup> One example, selected because the senior author is a moderate and respected international law scholar, is the recent article by Professor Christopher Joyner and Michael A. Grimaldi, *supra* note 115. As “Historical Background,” the authors spend 11 pages (*id.* at 631–41) discussing U.S. involvement, with heavy emphasis on contra operations in Nicaragua, but not once do they discuss the secret Cuban-Nicaraguan attack against neighboring states. The only passing reference is a single sentence: “Firmly committed to opposing communist incursion in the Western Hemisphere, the Reagan Administration determined early on that Nicaragua under the Sandinistas was a conduit for aggressive communist activities in Central America.” *Id.* at 634. This sentence seems to imply that the Reagan administration (there is no mention of the Carter administration's equivalent determination) is pursuing an anti-Communist American Brezhnev Doctrine for the hemisphere. Such one-sided historical background from a scholar of Professor Joyner's reputation shows that the “invisible attack” syndrome is indeed a major world-order threat with a unique ability to turn the rule of law against itself.

For a radical attack and reply by the author, see Chomsky, *Law and Imperialism in the Central American Conflict: A Reply to John Norton Moore*, 8 J. CONTEMP. STUD. 25 (1985); and Moore, *Tripping through Wonderland with Noam Chomsky: A Response*, *id.* at 47.

<sup>237</sup> One generic problem may be that the expertise on radical regimes' strategies of terrorism, “indirect aggression” and “wars of national liberation” has largely developed outside the international legal community. See generally J. PUSTAY, COUNTERINSURGENCY WARFARE (1965); R. CLINE & Y. ALEXANDER, *supra* note 2; W. LAQUEUR, TERRORISM (1977); J. MURPHY, LEGAL ASPECTS OF INTERNATIONAL TERRORISM (1980); Y. ALEXANDER, D. CARLTON & P. WILKINSON, TERRORISM: THEORY AND PRACTICE (1979). For general treatment of such strategies, see, e.g., L. SCHAPIRO, TOTALITARIANISM (1972); E. NOLTE, THREE FACES OF FASCISM: ACTION FRANCAISE, ITALIAN FASCISM, NATIONAL SOCIALISM (1969); C. JOHNSON, REVOLUTIONARY CHANGE (1966); H. ARENDT, THE ORIGINS OF TOTALITARIANISM (1973); E. HOFFER, THE TRUE BELIEVER (1951); and J.-F. REVEL, THE TOTALITARIAN TEMPTATION (1978).

that assistance to insurgents in the attacking state cannot be a proportional response.

A recent article by Professor Christopher Joyner and Michael Grimaldi illustrates the first argument:

For U.S. actions in Central America to qualify as legitimate collective self-defense, the United States needs to invoke the Rio Treaty, thereby activating use of the collective defense features of the regional alliance. The United States would first ascertain whether Nicaragua actually was supplying arms to El Salvador rebels, an action clearly in violation of Article 15 [*sic*] of the OAS Charter. If indeed illegal Nicaraguan assistance could be demonstrated, then charges could be presented to a convocation of a Meeting of Consultation under Article 6 of the Rio Treaty.<sup>238</sup>

This is a common misperception of the Rio Treaty, the basic defense treaty of the inter-American system. The Rio Treaty, like the NATO Treaty and every other significant defense agreement,<sup>239</sup> was structured to permit immediate response to an attack, as allowed under Article 51 of the UN Charter "until the Security Council has taken measures necessary to maintain international peace and security." The main purpose of the Rio Treaty, like all mutual defense treaties, is to go *beyond* the UN Charter in *creating an obligation to assist* in meeting an attack. Article 3 of the Rio Treaty is clear on these points:

(1) The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.

(2) On the request of the State or States directly attacked and until the decision of the Organ of Consultation of the Inter-American System, each one of the Contracting Parties may determine the immediate measures which it may individually take in fulfillment of the obligation contained in the preceding paragraph. . . .<sup>240</sup>

<sup>238</sup> See Joyner & Grimaldi, *supra* note 115, at 665. Note the reference to the old edition of the OAS Charter; it should be to Article 18 of the revised, post-1967 Charter.

<sup>239</sup> For the background of the Rio Treaty, see, e.g., *Inter-American Treaty of Reciprocal Assistance of Rio de Janeiro (1947)*, in 6 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW: REGIONAL CO-OPERATION, ORGANIZATIONS AND PROBLEMS* 217 (1983). See also the Rio Treaty, *supra* note 153.

<sup>240</sup> Pursuant to paragraph 2, all that is required for collective defense is a general request for assistance and that subsequent to such a request the requested state determines the measures it may individually take. Thus, El Salvador, which has requested general U.S. assistance in meeting the armed attack against it, is not required to approve each U.S. action such as assistance to the contras. Nevertheless, President Duarte has repeatedly and publicly recognized their contribution in reducing the intensity of the attack against El Salvador. See, e.g., Duarte's press conference of July 27, 1984, FBIS, *LATIN AMERICA*, at P2 (July 30, 1984). In May 1984, then President of El Salvador Magaña personally confirmed to the author that El Salvador had requested U.S. assistance.

(4) Measures of self-defense provided for under this Article may be taken until the Security Council of the United Nations has taken the measures necessary to maintain international peace and security.<sup>241</sup>

To make it *absolutely* clear that none of the *rights* of the parties under the UN Charter would be impaired, including the crucial Article 51 right of individual response to attack until the Security Council has taken effective action, the draftsmen of the Rio Treaty added Article 10, which provides: "None of the provisions of this Treaty shall be construed as impairing the rights and obligations of the High Contracting Parties under the Charter of the United Nations."<sup>242</sup>

The procedure under Article 6 of the Rio Treaty, which Professor Joyner correctly describes as requiring action by the Organ of Consultation, relates to nonarmed attack and does *not* affect the rights of the parties to take action pursuant to Article 3 in the event of an armed attack. Articles 3 and 6 are thus complementary. In any event, pursuant to Article 10, the right of defense, coextensive with that right in Article 51 of the Charter, would be preserved. It is not only incorrect, it is politically naive in the extreme to suppose that the members of the OAS—or of any other defensive alliance system—would have given up their traditional right of individual or collective defense against armed aggression when the very purpose of such an alliance is to strengthen their defensive capability.

A second argument is that any defensive response to "indirect," as opposed to "direct," aggression must be confined to the territory of the attacked state. This argument was advanced by some critics of American actions in Vietnam<sup>243</sup> and was recently revived in a thoughtful article by Professor Oscar Schachter, although he carefully presents it as a *proposed* rule.<sup>244</sup>

<sup>241</sup> Art. 3, paras. 1, 2 and 4, Rio Treaty, *supra* note 153.

<sup>242</sup> *Id.*, Art. 10. Since Article 103 of the UN Charter would already have ensured that no obligation under the Charter could be impaired by the Rio Treaty, the real purpose and effect of Article 10 is to protect the *rights* of the parties under the UN system, including the right of individual and collective defense.

<sup>243</sup> See, e.g., Falk, *International Law and the United States Role in the Vietnam War*, 75 YALE L.J. 1122, 1132 (1966).

<sup>244</sup> See Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1643 (1984).

Joyner and Grimaldi assert that this is a rule of positive international law in their recent article, relying solely on Schachter without noting that he carefully describes it as a "proposed" rule and that he discusses it in the broader setting of counter-intervention (which may occur without an armed attack) rather than indirect or covert armed attack. Joyner and Grimaldi's sole legal and policy argument for this critical assumption is the single sentence "[t]hough this limitation may seem inherently unjust, providing opportunities for the instigating culprit, international law sanctions neither the notion that 'might makes right' nor that 'two wrongs make a right'." Both notions are entirely unpersuasive in determining the scope of the right of effective defense, which is unquestionably "sanctioned" by international law. Joyner and Grimaldi's argument suffers from two common logical fallacies, *non sequitur* and *petitio principii*: "might (does not) make right" as a premise has no relevance to the scope of the defensive right under the Charter. That is, the authors' proposed conclusion does not follow from their premise; and "two wrongs do not make a right" begs the question as to whether a defensive response is a "wrong." See Joyner & Grimaldi, *supra* note 115, at 680–81. See, e.g., S. BARKER, *THE ELEMENTS OF LOGIC* (1965).

This "proposed rule" is not international law and should not be. As has been seen, most scholars have long supported the proposition that intensive "indirect" aggression is an armed attack permitting a defensive response under Article 51 of the UN Charter and customary international law.<sup>245</sup> Since the traditional rule has long been that assistance to a government at its request within its own boundaries is lawful even in the absence of an armed attack,<sup>246</sup> the very purpose of the determination of an armed attack is to permit proportional defensive measures against the attacking state. There is no evidence that its draftsmen intended to limit Article 51 as suggested by this proposed rule or that states party to the Charter have adopted any such rule. Contrary to Professor Schachter's suggestion that this proposed limitation "has been observed in nearly all recent civil wars,"<sup>247</sup> the United States specifically rejected it in the Vietnam War when the argument was made that it was impermissible to respond against North Vietnam as a defense to its "indirect" aggression against South Vietnam. It seems also to be rejected widely elsewhere, including in French, Soviet, Chinese and Israeli state practice.<sup>248</sup>

As a policy matter, the only purpose of such a rule would be to seek to reduce conflict by reducing the potential for territorial expansion. The rule might be more likely, however, to encourage conflict and "indirect" aggression by convincing states that such aggression is free from substantial risk: if it works, they will win; if it fails, there is no significant risk and they can try again. As this possibility suggests, the right of defense under customary international law and the Charter is a right of effective defense; that is, a right to take such actions as are reasonably necessary to end the attack promptly and protect the threatened values. Why should El Salvador and other Central American states be required to accept an endless secret war against them? Does anyone doubt that the United States would respond directly against Cuba and Nicaragua if under the same circumstances they were supporting within its territory an armed insurgency fielding forces one-sixth the size of a rapidly increased U.S. Army? Does anyone doubt that the Soviet Union, France, India, Brazil or Nigeria would so respond in similar circumstances? Just as the Charter is not a suicide pact, so too it is not a

<sup>245</sup> See, e.g., Kelsen, *supra* note 170.

<sup>246</sup> See, e.g., Moore, *supra* note 21.

<sup>247</sup> Schachter, *supra* note 244, at 1643.

<sup>248</sup> Subsequently, of course, North Vietnam invaded the South openly with more than 14 regular army divisions in blatant violation of the Paris Accords.

Although in both cases their actions are illegal, because in support of illegal direct invasions, the Soviet response against Pakistan and the Vietnamese response against Thailand are purportedly in response to assistance to insurgents in Afghanistan and Kampuchea, respectively. The factual premise of both the Soviet and the Vietnamese actions is upside down as to who is the attacker and who the defender, but the examples illustrate that the Soviet bloc has not accepted the proposed Schachter "rule." Nor does it have much following in the Middle East. Apparently, one motive for the Iraqi attack on Iran was Iranian support for insurgents in Iraq. Similarly, more than 30 years of contrary practice show that Israel has not accepted Schachter's proposed "rule." Nor has the PRC accepted it in responding to Vietnamese assistance to insurgents in Kampuchea, or France in responding against what it felt to be an FLN rebel garrison at Sakiet-Sidi-Youssef in Tunisia in 1958.

license to perpetual violence. The real check, when the proper scope of the defensive right is in issue, is the well-established requirement of necessity and proportionality.

A third argument sometimes advanced is that assistance to insurgents in the attacking state cannot be a proportional response or, specifically, that any U.S. assistance to the contras would not be proportional in the Central American conflict. Again, however, there is no such general rule of international law. As to proportionality (which is a requirement), it is difficult to understand how a response in kind that is considerably more restrained than the attack and that has not yet stopped the attack is somehow disproportionate. As we have seen, Cuba and Nicaragua are not bound by any such constraints as limit the U.S. response. Most importantly, the contras' response meets the test of proportionality, for it has blunted the attack but not yet ended it. Militarily, the rationale of their response is impeccable: it permits retaliation against resupply bases, creates a real incentive to call off the attack and ties down attacking forces through the classic "multiplier" effect of initiative and maneuver rather than static defense.<sup>249</sup> In fact, it is a reasonable defensive measure to encourage Cuba and Nicaragua to cease their secret war against their neighbors and not to doom El Salvador to a "twenty years war." Indeed, given the magnitude of the Cuban-Nicaraguan attack, it can be argued that a stronger response is required by Article 3 of the Rio Treaty.<sup>250</sup>

<sup>249</sup> See K. CLAUSEWITZ, *ON WAR* (1832); H. SUMMERS, *ON STRATEGY* (1983).

<sup>250</sup> Professor Chayes recently presented the "invisible attack" and "anemic right to defense" arguments in classic form:

[I]f some body, like the U.N. or the O.A.S. has not authorized it—you've got a unilateral decision here—the use of force in self-defense is authorized under international law only in the face of an armed attack, if an armed attack has been committed on another country. Then that country can respond by means of self-defense, and its allies can respond with it. So the first point is that, whatever Nicaragua has done, it has not launched an armed attack on anybody. The United States may talk about subversion, or exporting revolution, or whatever, but nobody says that Nicaragua has attacked El Salvador or anybody else. . . . The second point is that self-defense is just what it says. It's designed to protect you against what the other fellow is doing. You can't overthrow the other fellow's government in self-defense. That's clearly outside the range of what's permitted in self-defense, and in fact, once the President began to acknowledge openly that the object of the exercise was to make the Nicaraguans cry "uncle," that really solved the most difficult issue in the case from the Nicaraguans' point of view, because it's clear that you are not entitled, in self-defense, to overthrow the other guy's government.

*Chayes on Funding the Contras*, CHI. LAW., July 1985, at 21, 26–27. There are at least five and possibly six (depending on Chayes's intended meaning) factual and legal errors in this statement.

First, Chayes ignores the overwhelming evidence of the attack by Nicaragua on its neighbors, particularly El Salvador.

Second, Chayes is in error in arguing that "nobody says that Nicaragua has attacked El Salvador or anybody else." The point has repeatedly been made by this author, among others, including at an open meeting of the American Society of International Law in the presence of more than a hundred of Professor Chayes's colleagues and his co-counsel in the *Nicaragua* case, and in widely published articles. It has been made by both Secretary of State Shultz and the Government of El Salvador in sworn affidavits in the *Nicaragua* case, and by President Reagan in a speech of Jan. 24, 1985. See also *STATE-SPONSORED TERRORISM*, *supra* note 2, at 89.

Third, the President's "uncle" statement does not mean that U.S. policy is to overthrow the

In recent years, some authors have responded to the radical regimes' assault on Charter values by proposing a dramatic reinterpretation of the Charter to permit the use of force by the democracies in direct support of human rights and self-determination,<sup>251</sup> or a broader right of defense.<sup>252</sup> The converse of this effort to loosen the Charter standards on the use of force has been the less conscious trend, clearly evident in most of the literature on the Central American conflict, to restrict severely the Charter right of defense. In both cases, it seems preferable to adhere to that great dual principle of the Charter that the aggressive use of force is prohibited no matter how "just" the cause, and that nations have the right of individual and collective defense, which includes the right to take measures reasonably necessary to end the attack promptly.<sup>253</sup> Nothing is more likely to contribute to the present deterioration of world order than the combination of the "invisible attack" and "anemic defense" problems, which together fail to take appropriate measures against aggressive attack and undermine the critical deterrent of effective defense against such attack.

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Sandinistas by force, a point that is developed in detail in section IV below and thus will not be elaborated on here.

Fourth, Chayes is in error if he means to imply that there is no right of collective defense until authorized in a specific case by the United Nations or the OAS. See the discussion in section III, "The United States Response," above. To make the inherent right of defense effective, it must not be contingent on a prior Security Council finding of an attack. Chayes is also incorrect if he means to imply that prior OAS—or regional—authorization is required for, or even dispositive of, a legal right of defense against an armed attack. See Arts. 3 and 10 of the Rio Treaty, *supra* note 153, and Art. 51 of the UN Charter. Moreover, under the Charter the armed attack itself, not any regional determination, gives rise to the right of defense. Chayes's confusion on this point may stem from a peculiar legal theory he espoused about the Cuban missile crisis, that only OAS authorization confers legitimacy. Paradoxically, at that time he argued that lack of action by the Security Council constitutes authorization for regional enforcement action under Charter Article 53, a distinction that is not generally accepted. See, e.g., Moore, *supra* note 163, at 158–61; J. MOORE, *LAW AND THE GRENADA MISSION* 67 n.4 (1984).

Fifth, Chayes is in error in arguing that the right of defense can never extend to overthrowing the government of an attacking state. The scope of the right of defense is determined by necessity and proportionality. For further discussion of this point, see text at note 283 *infra*.

Finally, Chayes's view that the scope of the U.S. response, and not the response itself, is "the most difficult issue . . . from the Nicaraguans' point of view" gives his case away. For if Nicaragua is not attacking its neighbors, the response itself is determinative; and only if it is attacking its neighbors does the scope of the response become "the most difficult issue." Thus, Chayes is implicitly assuming that Nicaragua is attacking its neighbors without noting that even if he were correct in arguing that the U.S. response is not proportional (which he is not), then *both* Nicaragua and the United States would be violating the Charter. As we have seen, there is no basis even remotely arguable for the Nicaraguan attacks.

<sup>251</sup> See Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AJIL 642 (1984).

<sup>252</sup> See, e.g., Wallace, *International Law and the Use of Force: Reflections on the Need for Reform*, 19 INT'L LAW. 259 (1985). While raising important questions, in some respects this exercise seems prompted by an unduly narrow conception of existing rights of defense and regional peacekeeping under the Charter.

<sup>253</sup> This, I believe, remains the Charter standard.

*The Comandantes (and the FMLN) as Aggrieved Plaintiffs*

By pursuing their attack on neighboring states secretly, the comandantes have been able to posture before much of the world—except, notably, Central America<sup>254</sup>—as aggrieved plaintiffs. Like the childhood bully, they seek to persuade the world that “it all started when he hit me back.” There are at least six separate reasons why such a posture is not credible.

First, and most importantly, it is the comandantes who initiated the attack. Assistance to the contras is a defensive response that did not begin for well over a year after the most intense phase of the attack against El Salvador and after the Sandinistas were unambiguously offered economic assistance if they would halt their attacks. Nothing can more effectively undermine the restraint on the use of force mandated by the UN Charter than the failure to differentiate between aggression and defense.

Second, even if all the arguments restraining the right of defense were accepted and assistance to the contras were illegal, the comandantes’ assistance to insurgent groups in neighboring states would remain illegal under numerous fundamental international legal principles. To my knowledge, no scholar has seriously urged that these activities are lawful or doubted that they preceded assistance to resistance groups in Nicaragua. In any event, since the comandantes have pursued the secret war under considerably fewer constraints than are adhered to by the United States in response, their responsibility would seem greater. Why, then, should they be regarded as aggrieved plaintiffs when the activities they complain of against their regime are less damaging than their own activities?

The Sandinistas have sought approximately \$375 million in alleged damages for attacks by the contras.<sup>255</sup> This amounts to slightly over one-third of the more than \$1 billion in direct war damages inflicted on El Salvador to date by the FMLN.<sup>256</sup> There is authority in the practice of the World Court for the proposition that a complainant guilty of violating an identical or reciprocal obligation should not be permitted to recover. At the very least, Nicaragua must be so characterized for its attacks against its neighbors under any interpretation of the facts or the law. As Judge Hudson wrote in his opinion on *Diversion of Water from the Meuse*:

Article 38 of the Statute expressly directs the application of “general principles of law recognized by . . . nations”, and in more than one nation principles of equity have an established place in the legal system. . . . It must be concluded, therefore, that under Article 38 of the Statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply.

<sup>254</sup> Polls of public opinion in Central American countries and editorials in leading newspapers consistently show great concern about Sandinista policies. Even the Nicaraguans seem to be split over whether support for the contras will encourage pluralism, free elections and protection of human rights. See, e.g., SOVIET-CUBAN CONNECTION, *supra* note 14, at 26.

<sup>255</sup> See Memorial of Nicaragua, *supra* note 150, at 3.

<sup>256</sup> See SOVIET-CUBAN CONNECTION, *supra* note 14, at 33.



It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. . . .

. . . [I]n a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness.<sup>257</sup>

Third, the comandantes who are complaining about assistance to insurgent groups against them were themselves insurgents who came to power through massive outside assistance, including external financing, training, weapons supply and coordination of military tactics, and the direct participation of foreign nationals as combatants and military advisers.<sup>258</sup> True, the revolution against Somoza was blessed by an OAS resolution. But it is not at all clear that the OAS is empowered to—or under the UN Charter can lawfully—authorize assistance to insurgent movements against member governments.<sup>259</sup> For even against a clearly repressive regime, external assistance to a favored ideological faction may fundamentally distort the process of internal self-determination.<sup>260</sup> Clearly, there was strong and broad-based popular opposition to the Somoza regime. But is it clear that in the absence of major Cuban assistance to favored representatives of the three Marxist-Leninist factions in Nicaragua, these groups would have come to power? The point is not to argue for a general international legal right of assistance to insurgencies against regimes that have come to power with major foreign assistance. It is rather that a regime whose legitimacy is based solely on a seizure of power with foreign assistance, in seeking as plaintiff to make a case against such assistance, is relying on a principle that it has violated itself.

Fourth, this tenuous case of the regime as plaintiff is made even more tenuous by its failure to adhere to the internationally established conditions for its recognition. The comandantes, contrary to their pledge to the OAS and contrary to the OAS-established conditions for their recognition, have failed to hold free elections (after 6 years) and are moving toward totalitarian controls at home and alignment with aggressive regimes abroad.

Fifth, the comandantes' posture as plaintiff is called into question by the disrespect for international law shown in the discrepancy with known facts in their sworn affidavits and testimony to the World Court.<sup>261</sup>

Finally, it is surely relevant in considering the posture of the comandantes as plaintiff—at least in moral terms—that their regime has denied broadly

<sup>257</sup> *Diversion of Water from the Meuse (Neth. v. Belg.)*, 1937 PCIJ, ser. A/B, No. 70, at 76–77 (indiv. op. Hudson, J.).

<sup>258</sup> On these events, see generally S. CHRISTIAN, *NICARAGUA: REVOLUTION IN THE FAMILY* (1985).

<sup>259</sup> Elsewhere I have argued, as have other scholars such as Professor Rosalyn Higgins, that even the UN General Assembly has no such power. See Higgins, *Internal War and International Law*, 59 ASIL PROC. 67 (1965); and Moore, *supra* note 21, at 28–29. If the General Assembly has no such power, it seems a virtual certainty that the OAS has no such power.

<sup>260</sup> See Moore, *supra* note 21, at 30–31.

<sup>261</sup> See the discussion *supra* at note 96.

accepted international human rights and refused any genuine test of self-determination through free elections, while the democratic resistance has explicitly sought as their objectives human rights guarantees and free elections under international supervision.<sup>262</sup> Conversely, the FMLN insurgency in El Salvador—which they support—has insisted on power sharing, refused to participate in free elections, asserted that the Government of El Salvador must step down as a precondition to settlement<sup>263</sup> and continued its attacks against the Salvadoran political process despite El Salvador's strong progress toward full democracy.<sup>264</sup>

*The Alleged "American Brezhnev Doctrine"*

A centerpiece of the Sandinistas' allegations to the World Court is that the purpose of the United States is not to respond to armed aggression against Nicaragua's neighbors, but rather to overthrow a government in Managua with which it disagrees.<sup>265</sup> Typically, the "proof" offered for this argument is found in press conferences in which the U.S. President stressed the need for the comandantes to keep their pledge to the OAS and restore democratic rule and—on one occasion—stated that the United States would persist until the Sandinistas said "uncle."<sup>266</sup> Statements of individual contras are also cited to support the proposition that the contras' objective is to overthrow the Government in Managua rather than to interdict weapons supplies to the FMLN insurgents in El Salvador.<sup>267</sup> This argument implies that the United States is pursuing a hemispheric "American Brezhnev Doctrine" or, more broadly, a global policy of "war of national liberation."<sup>268</sup> There are at least five reasons why the argument is erroneous.

First, as has been seen, the United States vigorously sought good relations

<sup>262</sup> On the other hand, even the contras have not sought the physical overthrow of the Sandinistas. See notes 124–127 *supra* and accompanying text. See also Declaration of the Nicaraguan Democratic Force of February 21, 1984, in *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), U.S. Counter-Memorial, Annexes, Nos. 58–111 (submitted Aug. 17, 1984).

<sup>263</sup> See generally DEP'T OF STATE RESOURCE BOOK, *EL SALVADOR'S RUN-OFF ELECTION* (1984).

<sup>264</sup> On the Salvadoran elections and international reaction to them, see *id.*, and Dep't of State, *Statements Made after Sandinista Elections* (1984). See further notes 294–295 *infra* and accompanying text.

<sup>265</sup> See the Memorial of Nicaragua, *supra* note 150. See also statement by counsel for Nicaragua before the Annual Meeting of the American Society of International Law, 79 ASIL PROC. (1985) (forthcoming).

<sup>266</sup> N.Y. Times, Feb. 22, 1985, at A14, col. 3.

<sup>267</sup> See Memorial of Nicaragua, *supra* note 150.

<sup>268</sup> On the clearly illegal "Brezhnev Doctrine," see Rostow, *supra* note 4.

Nonlegal commentators have also fueled the fire of this allegation by supporting such policies in the face of the Soviet Union's support for the "Brezhnev Doctrine" and Marxist-Leninist "wars of national liberation," which are reverse sides of a "heads I win, tails you lose" double standard leading to permanent Marxist-Leninist governments. Another reason for the confusion is the failure to understand that there is a fundamental distinction under the Charter between, on the one hand, providing defensive assistance to resistance forces in an illegally attacked nation, as to the Afghan resistance, or assistance to insurgents in an attacking nation, as to the Nicaraguan democratic resistance, and, on the other hand, aggressively intervening to overthrow a government at peace with its neighbors or to prevent a change of form of such a government.

with the comandantes, even though it was evident that they were Marxist-Leninists. Only when the intelligence information of the Cuban-Nicaraguan secret war became overwhelming did the United States reluctantly suspend, and subsequently terminate, economic assistance to the Sandinistas. As the secret war continued and was accompanied by an unprecedented Central American arms buildup and failure by the Sandinistas to adhere to pledges made to the OAS, U.S. diplomatic policy shifted to include concern for these latter elements as well. There has never been a policy simply to overthrow the comandantes.

Second, neither presidential press conferences nor other statements by U.S. officials support the argument of the Sandinistas unless generous innuendo is supplied. Furthermore, snippets taken out of context from presidential press conferences, in which policy statements are customarily sketchy and incomplete, are not as useful a guide to overall U.S. policy as the complete record of diplomatic negotiations<sup>269</sup> and contemporaneous presidential speeches, letters and policy statements. In his speeches and statements, the President has pointed to the aggression by Nicaragua against its neighbors as the principal motivating factor in U.S. actions and has repeatedly stressed that the United States does not seek the overthrow of the Nicaraguan Government. Space permits mention of only a few examples here. In a special address before a joint session of Congress on April 27, 1983, President Reagan said:

But let us be clear as to the American attitude toward the Government of Nicaragua. We do not seek its overthrow. Our interest is to ensure that it does not infect its neighbors through the export of subversion and violence. Our purpose, in conformity with American and international law, is to prevent the flow of arms to El Salvador, Honduras, Guatemala, and Costa Rica. We have attempted to have a dialogue with the Government of Nicaragua, but it persists in its efforts to spread violence.<sup>270</sup>

In a speech to Western Hemisphere legislators on January 24, 1985, the President reiterated that the United States, "by supporting Nicaraguan freedom fighters is essentially acting in self-defense and is certainly consistent with the United Nations and OAS Charter provisions for individual and collective security."<sup>271</sup> In his State of the Union message on February 6, 1985, the President said: "The Sandinista dictatorship of Nicaragua, with full Cuban-Soviet bloc support, not only persecutes its people, the church and denies free press, but arms and provides bases for communist terrorists attacking neighboring states. Support for freedom fighters is self-defense and totally consistent with the OAS and UN Charters."<sup>272</sup> In his report to Congress on April 10, 1985, he added: "We have not sought to overthrow the Nicaraguan government nor to force on Nicaragua a specific system of

<sup>269</sup> See section II, "U.S. Efforts at Peaceful Settlement," *supra*.

<sup>270</sup> Address by President Ronald Reagan, DEP'T ST. BULL., No. 2075, June 1983, at 1, 3.

<sup>271</sup> Address by President Ronald Reagan, *id.*, No. 2096, Mar. 1985, at 4-5.

<sup>272</sup> Address by President Ronald Reagan, *id.*, No. 2097, Apr. 1985, at 9.

government,"<sup>273</sup> a position stated again in a letter to Congressman Bob Michel during the most recent debate on contra funding.<sup>274</sup>

Finally, regarding the \$27 million in humanitarian assistance to the contras, on August 30, 1985, President Reagan reaffirmed the U.S. commitment to peaceful resolution of the conflict. "In Nicaragua," he said,

we support the united Nicaraguan opposition's call for a church-mediated dialog, accompanied by a cease-fire, to achieve national reconciliation and representative government. We oppose the sharing of power through military force, as the guerrillas in El Salvador have demanded; the Nicaraguan democratic opposition shares our view. They have not demanded the overthrow of the Sandinista Government; they want only the right of free people to compete for power in free elections. By providing this humanitarian assistance we help keep that hope for freedom alive.<sup>275</sup>

Observers in the Nicaraguan Government have made similar reports about U.S. objectives in the Central American conflict. Former Sandinista junta member and Ambassador to the United States Arturo Cruz has written:

In August of 1981, the Assistant Secretary of State for Inter-American Affairs, Thomas Enders, met with my superiors in Managua, at the highest level. His message was clear: in exchange for non-importation of insurrection and a reduction in Nicaragua's armed forces, the United States pledged to support Nicaragua through mutual regional security arrangements as well as continuing economic relief. His government did not intend to interfere in our internal affairs. . . . My perception was that, despite its peremptory nature, the U.S. position vis-à-vis Nicaragua was defined by Mr. Enders with frankness, but also with respect for Nicaragua's right to choose its own destiny.<sup>276</sup>

We have already seen that Edén Pastora has confirmed this point about the Enders peace mission.

Third, U.S. policy in Central America and elsewhere is governed by applicable national legal restraints. The Boland amendment, which qualifies any United States assistance and is accepted as binding by the President, provides:

None of the funds provided in this Act may be used by the Central Intelligence Agency or the Department of Defense to furnish military equipment, military training or advice, or other support for military activities, to any group or individual, not part of a country's armed

<sup>273</sup> *U.S. Support*, *supra* note 105, at 209.

<sup>274</sup> Copy on file at the Center for Law and National Security (undated).

<sup>275</sup> 21 WEEKLY COMP. PRES. DOC. 1015, 1015 (Sept. 2, 1985). *See also* text at note 106 *supra*.

<sup>276</sup> Cruz, *Nicaragua's Imperiled Revolution*, 61 FOREIGN AFF. 1031, 1041-42 (1983). *See also* Pastora, *supra* note 90, at 10-11. When the author met privately with Secretary of State Haig early in the Reagan administration, the Secretary was deeply troubled by the intelligence reports on the Sandinistas: the focus of concern was not a government in Managua the United States did not like but its policy of "revolutionary internationalism" and attacks directed against neighboring states.

forces, for the purpose of overthrowing the Government of Nicaragua or provoking a military exchange between Nicaragua and Honduras.<sup>277</sup>

This legal condition has remained strictly in force following the recent congressional decision to renew nonlethal humanitarian assistance to the contras.<sup>278</sup> It is hardly consistent with the thesis of an American doctrine of "wars of national liberation" or "Brezhnev Doctrine."

There is strong evidence that the policy of assistance to resistance groups is, in fact as well as in theory,<sup>279</sup> working more effectively than a policy of direct interdiction and static defense confined to the territory of El Salvador. For example, the resupply base at La Concha in Nicaragua seems to have been taken out of action by resistance attacks.<sup>280</sup> In this connection, it should be remembered that the attack from Nicaragua is against four neighboring states, not just El Salvador. Thus, a response confined to the attacked states would require a separate U.S. response in all four, one of which, Guatemala, the United States has sought not to aid directly because of lingering human rights concerns. Since the policy of assisting the contras began, weapons deliveries to the FMLN in El Salvador have declined and Nicaraguan involvement in the attack on Guatemala appears to have been substantially reduced. The argument that the contras are not engaged in the direct interdiction of weapons is both factually wrong and naive in missing the point that assistance to the contras is a defensive strategy.<sup>281</sup>

Fourth, the policy of the contras, or democratic resistance, has not been to seek the forcible overthrow of the Sandinista Government. Despite some personal statements to the contrary, the resistance groups and their leadership have made it clear that they seek a negotiated end to the hostilities and that they seek to participate in internationally observed free elections in accordance with the OAS conditions.<sup>282</sup>

Finally, even if the objective of the United States were to overthrow the Government of Nicaragua—which it is not—in a setting of an ongoing armed attack against neighboring states by a government that refuses to cease those attacks and is engaged in a massive military buildup to support them, such an objective would be a lawful defensive objective; that is, it would be both necessary and proportionate to overthrow an attacking government that refused to halt its aggression. No one argued in World War II that the Allies could not legally replace Axis Governments or that such a change of gov-

<sup>277</sup> Boland amendment, *supra* note 117.

<sup>278</sup> This legal constraint is policed by a host of oversight mechanisms, including the Attorney General, two congressional select committees, the President's Intelligence Oversight Board, and the various agency general counsels and inspectors general.

<sup>279</sup> See text at notes 249–250 *supra*.

<sup>280</sup> On the importance of La Concha, see Dillon, *supra* note 80, at A29.

<sup>281</sup> Since the peoples of Central America generally have a common language and similar background, it would not be difficult for Nicaragua to infiltrate a substantial number of Nicaraguans into the secret attack on neighboring states. Some Salvadoran Marxist-Leninist groups apparently fought with the Sandinistas against Somoza. The contra policy makes this kind of escalation more difficult.

<sup>282</sup> See, e.g., *supra* note 127 and accompanying text.

ernment was not a permissible defensive war aim. Similarly, it was official UN policy in the Korean War to replace the Government of North Korea and unify the country in response to North Korea's aggression against the South.<sup>283</sup>

Discussion of the Monroe Doctrine occasioned by the Central American conflict has given rise to a related confusion. No American spokesman—or serious scholar—has invoked the Monroe Doctrine as a *legal* basis for U.S. actions in Central America.<sup>284</sup> Indeed, the Monroe Doctrine has not been invoked by the United States as legal or political doctrine since President Franklin Roosevelt enunciated the “Good Neighbor” policy in the 1930s.

Two points about the Monroe Doctrine deserve comment, however, in view of the charges about an “American Brezhnev Doctrine.” First, what content does the Monroe Doctrine retain since the adoption of the UN and OAS Charters? Second, what policy significance should the doctrine retain today for U.S. foreign policy and world order?

The Monroe Doctrine was first announced by President Monroe in 1823.<sup>285</sup> In its central part, Monroe declared it

important to the amicable relations existing between the United States and . . . [European] powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we shall not interfere. But with the governments who have declared their independence and maintain it and whose independence we have on great consideration and on just principles acknowledged, we could not view any interposition for the purpose of oppressing them or controlling in any other manner their destiny by any European power in any other light than as the manifestation of an unfriendly disposition toward the United States.<sup>286</sup>

As is evident in this excerpt, the original doctrine combined American security concerns and the idealism of a newly independent country determined to prevent the reimposition of colonialism in this hemisphere. As late as 1914, Elihu Root, a distinguished American jurist and a founding member of the American Society of International Law, wrote:

The Monroe Doctrine does not assert or imply or involve any right on the part of the United States to impair or control the independent sovereignty of any American state. . . .

The Monroe Doctrine does not infringe upon that [sovereignty]. It asserts [it]. The declaration of Monroe was that the rights and interests

<sup>283</sup> Only the direct intervention of the People's Republic of China prevented the realization of this policy.

<sup>284</sup> The ascription of this view to me by Joyner and Grimaldi is flatly wrong. Compare their statement, Joyner & Grimaldi, *supra* note 115, at 680, with the author's discussion cited by them, *id.* at 680 n.251.

<sup>285</sup> The best official summarization of the Monroe Doctrine is R. CLARK, MEMORANDUM ON THE MONROE DOCTRINE (1930).

<sup>286</sup> Quoted in N. GRAEBNER, IDEAS AND DIPLOMACY 143 (1964). For a recent discussion of the history of the doctrine, see *id.* at 213–61.

of the United States were involved in maintaining a condition, and the condition to be maintained was the independence of all the American countries.<sup>287</sup>

Nevertheless, the Monroe Doctrine was widely regarded in Latin America, particularly during Theodore Roosevelt's administration—the period of the “Roosevelt corollary”—as inconsistent with national sovereignty and the principle of nonintervention. In reality, the doctrine seems variously to have served U.S. national security interests and Latin American self-determination, or both, as when the United States pressured France to withdraw support for Maximilian's colonial effort in Mexico.<sup>288</sup> Since U.S. ratification of the United Nations and OAS Charters in 1945 and 1948, however, no lawful Monroe Doctrine can be inconsistent with those great Charters,<sup>289</sup> including any sort of “Roosevelt corollary” inconsistent with Latin American sovereignty. It is not surprising, then, that the United States has not asserted any such right in the post-Charter period. Moreover, the second of the two original purposes of the Monroe Doctrine, to prevent the forcible reimposition of colonialism and denial of self-determination in Latin America, is fully consistent with the UN Charter and hemispheric principles of collective defense against armed aggression. That “doctrine” is poles apart from the “Brezhnev Doctrine” asserted by the Soviet Union in the same post-Charter period as an unlimited privilege to prevent any state in its sphere of influence from ever altering its Marxist-Leninist form of government.

As to the policy significance the doctrine should retain today, there seems little point in preserving the title of a doctrine unfavorably remembered from pre-Charter years by our fellow Americans. Nevertheless, the underpinning of the doctrine, embodied in the present OAS system of collective defense against externally assisted efforts to deprive American states of their right of self-determination, should continue to be an important component of U.S.—and Latin American—foreign policy and is directly relevant to the Central American setting. Similarly, the underlying reality of the doctrine, which is that hostile attempts to gain hegemony in the Americas can directly threaten the security of the United States and the hemisphere, has continuing relevance in considering how far the Soviet Union will go to expand its influence in this hemisphere. If the Soviet-assisted effort forcibly to install client governments in an area not even contiguous to the USSR is permitted to succeed,<sup>290</sup> it will spell failure not only for U.S. policy, but also for world

<sup>287</sup> Root, *The Real Monroe Doctrine*, 8 AJIL 427, 433–34 (1914).

<sup>288</sup> See N. GRAEBNER, *supra* note 285, at 251.

<sup>289</sup> In an earlier era, the Monroe Doctrine was accorded considerable recognition in international law. Thus, Article 21 of the League Covenant said: “Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe Doctrine, for securing the maintenance of peace.” See M. HUDSON, *INTERNATIONAL LEGISLATION* 1 (1931). See also the statement by the British negotiator on the right of defense retained under the Kellogg-Briand Pact. Wright, *The Meaning of the Pact of Paris*, 27 AJIL 39, 42 (1933).

<sup>290</sup> On the threat to world order posed by activism of major powers in areas of traditional sensitivity to opposing powers, see Moore, *supra* note 21, at 30.

order, Latin American nations, the OAS, and the fundamental principles underlying hemispheric solidarity, including self-determination and nonintervention.

### *Human Rights and the War of Misinformation*

Modern international law rightly attaches great importance to the maintenance by states of internationally established standards of human rights.<sup>291</sup> It has traditionally prescribed minimum standards for the conduct of hostilities that in critical respects reflect standards applicable to armed conflict.<sup>292</sup> Examination of the Central American conflict with these standards in mind reveals abuses on all sides.<sup>293</sup> Nevertheless, it also shows substantial differences among governments and military forces in their commitment to human rights and in the use of human rights for propaganda and disinformation. A comparison between the current Duarte Government of El Salvador and the Sandinista Government of Nicaragua illustrates both problems and differences in their commitment to human rights.

President Duarte was elected in 1984 in a free election observed by delegations from all over the world.<sup>294</sup> His Christian Democrat Party is social democratic by European and world standards. He has supported the sweeping land reform begun in El Salvador's 1979 social revolution.<sup>295</sup> As Professor Alberto Coll has written:

Throughout his political career he [President Duarte] has endured death threats from the right and the left for promoting, in the not too fertile soil of El Salvador's political culture, Christian Democratic ideals of political pluralism, land distribution, and freedom of association for labor unions. In 1984, when told that Fidel Castro had dispatched an assassination squad to eliminate him, he replied without fanfare that he was willing to give his own life for what was best for his country.<sup>296</sup>

<sup>291</sup> See generally, e.g., L. HENKIN, *THE RIGHTS OF MAN TODAY* (1978). On the right of "humanitarian intervention," see note 21 *supra*, and *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* (R. Lillich ed. 1973); and on the right to use force, see Reisman, *supra* note 251.

<sup>292</sup> See generally *THE LAWS OF ARMED CONFLICTS* (D. Schindler & J. Toman eds. 1981). See also J. BOND, *THE RULES OF RIOT* (1977).

<sup>293</sup> For a general analysis critical of compliance on all sides, see, e.g., *INTER-AMERICAN COMMISSION ON HUMAN RIGHTS [IACHR], 1980-81 ANNUAL REPORT; IACHR, REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE REPUBLIC OF NICARAGUA* (1981); *DEP'T OF STATE, COUNTRY REPORTS FOR 1983*, *supra* note 26; *AMNESTY INTERNATIONAL, REPORT OF THE MISSIONS TO THE REPUBLIC OF NICARAGUA* (1982) (especially the Aug. 1979, Jan. 1980, and Aug. 1980 missions, which focused largely on the "special tribunals"); *AMERICAS WATCH, FREE FIRE: A REPORT ON HUMAN RIGHTS IN EL SALVADOR* (1984); *AMERICAS WATCH, THE MISKITOS IN NICARAGUA 1981-84* (1984); *AMERICAS WATCH, HUMAN RIGHTS IN NICARAGUA* (1982); *AMERICAS WATCH, ON HUMAN RIGHTS IN NICARAGUA* (1982); *AMNESTY INTERNATIONAL, DISAPPEARANCES IN GUATEMALA* (1985).

<sup>294</sup> See, e.g., *DEP'T OF STATE, EL SALVADOR'S 1985 ELECTIONS: LEGISLATIVE ASSEMBLY AND MUNICIPAL COUNCILS* (1985) [hereinafter cited as 1985 ELECTIONS].

<sup>295</sup> El Salvador's land reform has made real progress in the past several years. See, e.g., *DEP'T OF STATE, BACKGROUND NOTES: EL SALVADOR 6-7* (1985).

<sup>296</sup> Coll, *Political and Military Losers, Salvador's Leftists Opt for Terror*, *Wall St. J.*, Oct. 18, 1985, at 29, cols. 3-6.



Under Duarte the judicial system particularly has been strengthened to bring to justice those guilty of "death squad" killings, and army officers even suspected of complicity in such activities have been transferred.<sup>297</sup> A Revisory Commission has been established to examine the entire legal system, beginning with the criminal justice system. Arrest procedures have been tightened and strict rules of engagement adopted for military forces.<sup>298</sup> Despite the ongoing armed attack against it, El Salvador boasts freedom of religion, a free and vigorous press, a work force free to organize and bargain collectively, a mixed economy with a healthy private sector, a strong political opposition and improving maintenance of civil, political and judicial guarantees. President Duarte's commitment to democratic pluralism, human rights and social justice is long-standing and well known.<sup>299</sup> He has also moved to open a dialogue with the FMLN and has offered its members general amnesty as well as an opportunity to participate in free elections with political and security guarantees.<sup>300</sup>

It should be recalled that prior to 1979, El Salvador, like much of Central America, was largely controlled by a traditional oligarchy. In 1979 El Salvador underwent a genuine social revolution that began a rapid transition to democratic pluralism. Since that revolution, El Salvador has been victimized by a small, violent right and a violent left that is externally organized, financed and assisted. Until recent years, killings by the far right may have been the principal human rights problem in El Salvador. At least since the election of President Duarte, however, such killings have dramatically declined.<sup>301</sup> Today terrorism by the externally supported far left seems to be the principal human rights problem. The great majority of the people supports neither the violent right nor the violent left, as the election of President Duarte showed. The success of President Duarte's reformist administration and the increasing political extremism of the FMLN are demonstrated by Mexico's recent decision, after a 6-year break, to reestablish diplomatic relations with El Salvador.<sup>302</sup>

The Sandinista Government of Nicaragua came to power in the revolution of July 19, 1979. During and in the immediate aftermath of the revolution,

<sup>297</sup> See AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL'S CURRENT CONCERNS IN EL SALVADOR 3-4 (1985).

<sup>298</sup> 1985 ELECTIONS, *supra* note 294, at 6.

<sup>299</sup> The author participated in vigorous questioning of then presidential candidate Duarte on these issues while serving as a member of the U.S. presidential delegation to observe the elections. Our questions focused heavily on the need to strengthen human rights and the judicial system, to control the small, violent right, and to pursue social justice. We were impressed with the depth of Duarte's commitments on these issues.

<sup>300</sup> On this initiative, announced in a speech on Oct. 8, 1984 to the UN General Assembly, see 1985 ELECTIONS, *supra* note 294, at 6. Discussions with the FMLN have been held on at least two occasions, but progress has been blocked by the refusal of the FMLN to participate in free elections and its insistence on forced power sharing. See *id.*

<sup>301</sup> See DEP'T OF STATE, SUSTAINING A CONSISTENT POLICY IN CENTRAL AMERICA: ONE YEAR AFTER THE NATIONAL BIPARTISAN COMMISSION REPORT 7 (1985).

<sup>302</sup> See Coll, *supra* note 296, at 29.

the nine comandantes de-emphasized their Marxism-Leninism and included a number of well-known democratic leaders in the Sandinista movement.<sup>303</sup> It was widely hoped in the West and in Latin America that as a result of their pledges to the OAS, the broad-based support for the revolution and the presence of leading democrats in the Government that the Sandinista revolution would evolve into democratic pluralism.

Almost immediately, however, the revolution began to drift toward totalitarianism. The promised elections were repeatedly postponed, and when held more than 5 years after the revolution, were far from free. Democratic opposition parties were denied the means to conduct a fair election, and when Arturo Cruz still bravely opted to participate, he was denied access to the media and stoned by "*turbas*" using classical Somoza tactics.<sup>304</sup> The Sandinista Party was virtually merged with the state and the army was placed under the control of the party.<sup>305</sup> A pervasive Cuban-style internal security apparatus was installed under the guidance of a former colonel in the Cuban intelligence service.<sup>306</sup> Labor unions were taken over by the Sandinista "front" and those which refused to be co-opted were systematically harassed and attacked.<sup>307</sup> The Sandinistas confiscated property of some Protestant churches, such as the Mennonites, the Church of Jesus Christ of Latter Day Saints, the Jehovah's Witnesses and the Seventh Day Adventists, after accusations that they were "counterrevolutionary."<sup>308</sup>

Opposition to the regime from within the traditional Roman Catholic Church was harassed and a "people's church" was encouraged in opposition to Rome.<sup>309</sup> Harassment of the church itself has continued. In September 1985, despite an informal agreement that seminarians would be exempt from the draft, the Sandinistas began inducting them. In September and October, the Sandinista DGSE raided Radio Católica, the radio station of the church, and refused to allow broadcasts of liturgical services delivered by Cardinal Obando y Bravo. On October 12, the Ministry of the Interior seized all copies of the first printing of the church newspaper *La Iglesia*. On October 15, DGSE officials, led by Comandante Lenín Cerna, raided the Curia Social Services Office. Monsignor Bismarck Carballo, the Curia

<sup>303</sup> Such as Arturo Cruz, Alfredo César, former head of Nicaragua's central bank, and Violeta Chamorro.

<sup>304</sup> For an analysis of the Nicaraguan election, see Colburn, *Nicaragua under Siege*, 84 CURRENT HISTORY 105 (1985); see also DEP'T OF STATE, RESOURCE BOOK, SANDINISTA ELECTIONS IN NICARAGUA (1984).

<sup>305</sup> See SOVIET-CUBAN CONNECTION, *supra* note 14, at 20.

<sup>306</sup> See BROKEN PROMISES, *supra* note 11, at 2.

<sup>307</sup> See Leiken, *Sandinista Corruption and Violence Breed Bitter Opposition: Nicaragua's Untold Stories*, NEW REPUBLIC, Oct. 8, 1984, at 28; see also BROKEN PROMISES, *supra* note 11, at 11-16.

<sup>308</sup> See DEP'T OF STATE, COUNTRY REPORTS FOR 1983, *supra* note 26, at 643.

<sup>309</sup> See *id.* The Grenada documents are particularly revealing on efforts to control the church in Cuba and Grenada and the "people's church" strategy. These documents also illustrate especial paranoia toward the "Socialist International" and consistent efforts to penetrate and frustrate this independent and non-Communist world socialist movement. See generally DEP'T OF STATE, GRENADA DOCUMENTS: AN OVERVIEW AND SELECTION (1984).

spokesman and church Director of Information, was forcibly removed and threatened with death.<sup>310</sup>

Mass organizations of women, youth and other groups tightly controlled by the Sandinistas were established on lines reminiscent of the Cuban model for dominating society's infrastructure.<sup>311</sup> The media were taken over by the Sandinistas and the only remaining independent paper, *La Prensa*, which had strongly opposed Somoza, was censored on a daily basis.<sup>312</sup> Indeed, shortly after the November elections, Pedro Chamorro, then editor of *La Prensa*, left Nicaragua and "announced that he would stay in voluntary exile until full press freedom is granted."<sup>313</sup>

The Sandinistas established "special tribunals" to try their political opponents outside the normal judicial process.<sup>314</sup> In addition, most observers agree that a substantial number of persons were murdered immediately after the revolution.<sup>315</sup> Alvaro Baldizón, who describes his role as the chief investigator of alleged human rights violations for Interior Minister Tomás Borge from 1982 to July 1985, is reported by the *Washington Post* as having said that the "Sandinista government of Nicaragua has covered up thousands of cases of human rights violations and murder," including "the execution by firing squad of more than 150 Miskito Indians during the summer of 1982."<sup>316</sup> A summary of information supplied by Baldizón contains this description of massive human rights abuses in Sandinista Nicaragua, together with many other, more graphic examples.

The special investigations committee [of the Nicaraguan Ministry of the Interior] began operations in January 1983 and soon concluded that 90 percent of the IAHRC [Inter-American Human Rights Commission] denunciations [on human rights] were correct. . . .

During the course of Baldizón's investigations for the Interior Ministry he discovered that the GON had adopted, as a matter of policy, the state sanctioned assassination of political opponents to the Sandinista regime. These assassinations were personally ordered by such people as Interior Minister Tomás Borge and Interior Vice Minister Luis Carrion. Baldizón investigated cases that showed that hundreds of people had been killed by GON authorities. . . .

<sup>310</sup> See Dep't of State, *Chronology of Church-State Confrontations and State of Emergency* (1985), and *Recent Developments in Nicaragua* (1985).

<sup>311</sup> See Colburn, *supra* note 304, at 105.

<sup>312</sup> See Lantigua, *Sandinista Talks with La Prensa*, *Wash. Post*, Mar. 25, 1985, at A12, col. 1.

<sup>313</sup> *Id.*

<sup>314</sup> See IACHR, *REPORT ON THE SITUATION*, *supra* note 293, at 74-86.

<sup>315</sup> The COSEP study reports that "Jose Esteban Gonzalez, head of the Permanent Human Rights Commission before, during and after the revolution that overthrew Somoza, attests that: 'during the first months, from July 1979 until February 1980, the Sandinistas executed in jail no less than two thousand prisoners'." See COSEP, *supra* note 22, at 21. See also the quotation from Ismael Reyes, head of the Nicaraguan Red Cross, *id.* at 23.

<sup>316</sup> Babcock, *Defector Assails Sandinistas on Human Rights*, *Wash. Post*, Sept. 19, 1985, at A26, cols. 1-6.

The investigators found evidence that the EPS [Sandinista Army] and the DGSE had killed many Indians after they were captured, had taken many others captured in combat for interrogation and then killed them, and had taken hundreds of other prisoners in the towns and removed them from their houses. The investigators also found that the Ministers of Interior and Defense had established a special commission to determine the fate of the Miskito prisoners. . . . According to one report the commission ordered . . . the execution of more than 100. The investigators also found a copy of an October 1982 report from Sub-Comandante Gonzales to Vice Minister Luis Carrion in which Gonzales reported that 40 Miskitos had been killed in combat, 200 imprisoned and 150 executed by the EPS and DGSE as a result of the commission's decisions.

The investigators reported in June 1984 that more than 300 farmers had been executed and that in 80 percent of the cases the execution was proposed by . . . the MINT [Ministry of the Interior] Delegate in Region VI, who asked for and received permission to apply "special measures" from Vice Minister Luis Carrion.<sup>317</sup>

Independent human rights organizations in Nicaragua have reported continual political killings, disappearances and torture and a substantial number of political prisoners. In response, the Sandinistas have harassed these organizations and established a government-controlled commission to rebut their work and to use human rights for propaganda purposes.<sup>318</sup> Normal judicial guarantees such as habeas corpus have been modified and criminal penalties for political crimes have been applied retroactively and extended to family members.<sup>319</sup> Detained foreign nationals have been denied access to consular officials as required by the Vienna Convention on Consular Relations.<sup>320</sup> Education is heavily politicized.<sup>321</sup> Emigration has been controlled by new restrictions on passports.<sup>322</sup> The Miskito, Sumo and Rama Indians of the Atlantic region were in large part forcibly relocated from their traditional lands.<sup>323</sup> In the process, many were killed or fled the country, over half of their villages were destroyed and roughly a quarter of the remaining Indians were sent to government "relocation camps."<sup>324</sup>

<sup>317</sup> Information Supplied by Alvaro Baldizon Aviles, *supra* note 28, at 1, 7 and 9.

<sup>318</sup> See, e.g., DEP'T OF STATE, COUNTRY REPORTS FOR 1983, *supra* note 26, at 646; Durenberger, *Human Rights and Dissent in Nicaragua*, 130 CONG. REC. S6599 (daily ed. June 5, 1984). See also *id.* at S6600-05 (statement of executive director of nongovernmental Permanent Commission on Human Rights).

<sup>319</sup> See BROKEN PROMISES, *supra* note 11, at 6-10.

<sup>320</sup> See Department of State diplomatic notes from the United States to Nicaragua regarding the arrest on their yacht *Wahine* on Aug. 6, 1985 and detention of U.S. citizens Leo and Dolores Lajeunesse.

<sup>321</sup> See BROKEN PROMISES, *supra* note 11, at 19.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.* at 19-22. See also IACHR, REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE SEGMENT OF THE NICARAGUAN POPULATION OF MISKITO ORIGINS (1983). Professor Bernard Nietschmann declared on Oct. 3, 1983:

These problems have impelled most of the democratic leaders who initially aligned themselves with the Sandinistas against Somoza to leave the Government or even the country.<sup>325</sup> Some of them, such as Adolfo Calero, Arturo Cruz, Edén Pastora and Alfonso Robelo, have shifted support to the growing democratic resistance.<sup>326</sup> Most recently, on October 16, 1985, Nicaragua's ruling Sandinistas formally implemented sweeping restrictions on remaining civil liberties, including the right of assembly, the right to travel within Nicaragua, the right to habeas corpus, the right to a trial, the right to judicial appeal, the right to strike, the right to private mail and the right to form political groups.<sup>327</sup> This Sandinista pattern of denial of human rights is of serious concern and certainly violates important international guarantees.<sup>328</sup>

A comparison of human rights issues under the law of war also illustrates

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In several villages I talked to people who had witnessed the arbitrary killing of Miskito civilians by Sandinista military forces. Many of these killings occurred during one of several Sandinista military invasions and occupations of Indian villages. Some of the villagers were arbitrarily shot when the government soldiers first invaded the villages; others were killed during the weeks of occupation, confinement, torture and interrogation. For example, it was reported to me by several different first-hand sources that one man was nailed through his hands and ankles to a wall and told he would remain there until he either confessed to being a "contra" or died. He died. His widow, dressed in black, and others in that traumatized village were filled with grief and anger over this and other atrocities committed during their forced confinement under a reign of terror by several hundred Sandinista soldiers. Other Miskitos were killed by forcing their heads under water to extract confessions of "counterrevolutionary" activities. Two older men, 60 and 63 years of age, were threatened with death unless they confessed to involvement with "contras." They too were finally killed in the course of these same events.

Throughout my notes and tape recordings are descriptions of such killings in village after village in the Atlantic Coast Indian region. Descriptions were given to me by wives, daughters, mothers, and other relatives and villagers. The occurrence of arbitrary killings of Miskito civilians appears to be widespread. A pattern is readily seen. Miskito men and women are accused of being contras, tortured or threatened with death unless they confess, killed, and then reported as having been contras, if indeed, there is any report at all.

Statement by Professor Bernard Nietschmann to the Indian Law Resource Center, Washington, D.C. (Oct. 3, 1983).

<sup>325</sup> See *BROKEN PROMISES*, *supra* note 11, at 23. See also *Wash. Post*, Oct. 28, 1985, at A18, col. 5.

<sup>326</sup> See section II, "Contra Assistance as a Response," *supra*.

<sup>327</sup> See Cody, *Nicaraguan Crackdown Seen Aimed at Church*, *Wash. Post*, Oct. 17, 1985, at A1, A33, cols. 2-4. See also Dep't of State, *Suspension of Civil Rights in Nicaragua* (1985). The following rights and guarantees provided for in Decree No. 52 of Aug. 21, 1979 were suspended: Article 8 (right of individual liberties and personal security); Article 11 (right to be presumed innocent until proven guilty and right to appeal); Article 13 (right to a trial); Article 15 (freedom of movement); Article 18 (freedom from arbitrary interference in personal life, family, home and correspondence); Article 20 (freedom of information); Article 21 (freedom of expression); Article 23 (right of peaceful assembly); Article 24 (freedom of association); Article 31 (right to organize unions); and Article 32 (right to strike).

<sup>328</sup> For a minimal list, see *supra* note 20. Repeated charges of U.S. "genocide" by the Sandinistas may reflect a concern that their policies toward the Indians of the Atlantic region could be challenged as genocide under the Genocide Convention, *supra* note 20. For such charges against the United States, see, e.g., Comandante Ortega's statement to the UN General Assembly, *Wash. Post*, Oct. 3, 1984, at A24, cols. 1-2.

common regional problems and differences.<sup>329</sup> The deliberate killing of Misquito Indian prisoners by the Sandinista military forces during anticontra operations, as reported by Alvaro Baldizón, Professor Nietschmann<sup>330</sup> and others, is a direct—and massive—violation of the minimum guarantees applicable to the conflict in Nicaragua under common Article 3 of the Geneva Conventions.<sup>331</sup> Similarly, the shooting of wounded contras with their hands tied behind their backs at El Corozo, as charged by Edén Pastora, is, if true, a blatant violation of Article 3.<sup>332</sup>

There also have been persistent reports of contra attacks in violation of Article 3, and it seems likely that some have taken place.<sup>333</sup> All such violations should be condemned. The most important issue, however, is whether these democratic resistance forces have adopted a policy of intentional terror and attacks on civilians or have sought to comply with international human rights standards.<sup>334</sup> There seems to be little credible evidence—but there is some—that these groups are employing terrorism or attacks on civilians as deliberate policy.<sup>335</sup> Their leaders have stressed their commitment to human

<sup>329</sup> See AMERICAS WATCH, VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES IN NICARAGUA 1981–85 (March 1985); and *id.* (1st Supp. June 1985). Americas Watch is particularly weak on law of war issues: e.g., it condemns the contras' small-scale mining of harbors as indiscriminate without analyzing whether it met the standards established by the Hague Convention, *supra* note 183, and fails completely to discuss the charges of widespread indiscriminate use of land mines by FMLN insurgents in El Salvador. On the submarine mine issue, see *supra* note 183.

<sup>330</sup> See *supra* note 324.

<sup>331</sup> Common Article 3 of the 1949 Geneva Conventions for the Protection of Victims of War applies to conflicts "not of an international character." See, e.g., Art. 3, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287. Of course, if the conflict is considered an international conflict, then the full guarantees of the Conventions apply.

<sup>332</sup> Pastora, *supra* note 90, at 12.

On other violations and the use of civilian terror by the FMLN in El Salvador, see, e.g., *El Salvadoran Guerrillas Execute 18*, *supra* note 183, at A25; Kirkpatrick, *The Suffering of a Father / President*, Wash. Post, Oct. 6, 1985, at D7, cols. 2–4 (on kidnapping of President Duarte's daughter and 13 mayors); Cody, *Duarte, Citing Threats, Sends 7 of Family to U.S.*, Wash. Post, Oct. 15, 1985, at A11, cols. 1–6; Omang, *Land Mines Take Toll in El Salvador*, Wash. Post, Sept. 17, 1985, at A19, cols. 3–6 (the FMLN "is strewing the earth with land mines"); McCartney, *Split Noted in Salvadoran Rebel Front*, Wash. Post, Aug. 19, 1985, at A1, col. 4 (on politicians' criticism of guerrillas for attacking civilian targets). On the FMLN's use of human rights issues to spread disinformation against El Salvador, see, e.g., Young, *supra* note 124, at 321; Dep't of State, *The Battle of Suchitoto: An Example of Guerrilla Deception* (1984).

<sup>333</sup> See, e.g., the two Americas Watch reports, *supra* note 329. See also D. FOX & M. GLENNON, *supra* note 95. Although the authors are clearly sincere, their use of a Sandinista governmental car and driver, and the procedures employed, e.g., in selecting and interviewing persons and reporting the results, significantly flawed the report. On designing social science research, see generally D. CAMPBELL & J. STANLEY, *EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH* (1966).

<sup>334</sup> The difference is that between U.S. conduct in Vietnam, which had its Lt. Calleys, and North Vietnam's deliberate strategy of terrorism against the civilian population and mistreatment of prisoners of war. See, e.g., G. LEWY, *AMERICA IN VIETNAM*, chs. 7, 8, 9 and 10 (1977).

<sup>335</sup> But Americas Watch—which of human rights groups seems to be the most sympathetic toward the Sandinistas—does conclude that the contras "practice terror as a deliberate policy." See the Americas Watch report of March 1985, *supra* note 329, at vi.

rights and they point out that individuals found guilty of violations have been dealt with severely. Moreover, the largest such group, the Nicaraguan Democratic Force (FDN), has publicly called for an investigation by the Inter-American Commission on Human Rights of violations on both sides of the Nicaraguan conflict and has said it would welcome an investigation by Nicaragua's Permanent Commission on Human Rights.<sup>336</sup>

As with human rights allegations against the Duarte Government in El Salvador, there is evidence that real and alleged violations by the *contras* are being used as part of an organized campaign of misinformation. A much publicized forum on Capitol Hill presided over by Senator Edward Kennedy—whose human rights efforts were in good faith—turned into an embarrassment when it was discovered that staffers had accepted witnesses handpicked by the Sandinistas.<sup>337</sup> More recently, it turned out that a highly publicized report on alleged human rights violations by the *contras*—timed to coincide with a congressional vote on funding them—had been prepared with the assistance of the Washington law firm that serves as the registered agent of Nicaragua in the United States and had been funded by the Nicaraguan Government.<sup>338</sup>

<sup>336</sup> See Los Angeles Times, Mar. 16, 1985, at 14, cols. 1-3.

<sup>337</sup> See Muravchik, *Manipulating the Miskitos*, NEW REPUBLIC, Aug. 6, 1984, at 21-25.

<sup>338</sup> This refers to the Reed Brody report, *supra* note 139. Mateo Guerrero, former executive director of the Nicaraguan Human Rights Commission, describes the evolution of the report as follows:

In September 1984, Bendana ordered the CNPPDH to provide full support to American lawyers Reed Brody and James Bordelon who were preparing a report on human rights abuses allegedly committed by the armed opposition—a report to be used in the United States by groups opposed to U.S. policy. The CNPPDH provided Brody and Bordelon with an office at its headquarters in Managua, lodging in an FSLN-owned hotel managed by commission member Zulema Baltodano, and transportation. It also paid all the bills incurred during their visit, totaling some 50,000 cordobas, which Bendana agreed to reimburse out of Foreign Ministry funds. Sister Mary Hartman, an American nun who works for the CNPPDH, arranged the interviews and sent Brody and Bordelon to investigate cases she believed would have most impact on the lawyers and the public.

See Inside Sandinista Regime, *supra* note 28, at 3.

The "contra manual" controversy also seems to have erroneously fueled human rights charges against the *contras*. In an early version, this training manual for contra forces did use several ambiguous translations and phrases that could have been interpreted as supporting violations of the law of war. Even ambiguity in such a setting, of course, is wrong. After the manual had been *locally* corrected and erroneous versions withdrawn, a controversy arose about the original manual. An independent investigation by the House Permanent Select Committee on Intelligence and the President's Intelligence Oversight Board, among others, turned up no evidence that the original manual had been instrumental in any law of war violations or had been so intended. Indeed, the investigations revealed that a principal purpose of the manual was to train in humane principles and that it and the accompanying training were filled with references to the need to protect civilians and persons under the insurgents' control. Moreover, it had been so interpreted by those who used it. See PSYCHOLOGICAL OPERATIONS IN GUERRILLA WARFARE 48 (1985).

Paradoxically, David Nolan has pointed out that it was Sandinista strategy during the revolution "to eliminate the government presence through the assassination of the *jueces de mesta*" (defined by Nolan as "local constabulary"). D. NOLAN, *supra* note 8, at 46.

Human rights are too important to be casualties of a war of misinformation. There is urgent need for improvement on all sides in the Central American conflict.<sup>339</sup> Nevertheless, there seems to be a difference in magnitude between the general levels of human rights compliance in El Salvador following the election of President Duarte and in Nicaragua during the drift toward totalitarianism under the Sandinistas.<sup>340</sup>

## V. STRENGTHENING WORLD ORDER

The secret war in Central America illustrates the danger to world order—and to the legal order itself—posed by the assaults of radical regimes. In Nicaragua three small and unrepresentative Marxist-Leninist factions came to power through focused Cuban economic and military assistance during a genuine and broad-based revolution against Somoza. Subsequently, the nine leaders of these factions joined with Cuba in a secret war against neighboring states.<sup>341</sup> That war is conducted through assistance in organizing Marxist-Leninist-controlled insurgencies; the financing of such insurgencies; the provision and transshipment to them of arms and ammunition; training the insurgents; assistance in command and control, intelligence, military and logistics activities; and extensive political support. It also includes terrorist attacks and subversive activities preliminary to and supportive of an all-out covert attack.

Arrayed in support of this secret war is a diverse conglomeration of radical regimes and insurgent movements from the Soviet Union and Soviet-bloc nations such as East Germany, Bulgaria, Czechoslovakia, Cuba, Vietnam, Ethiopia and North Korea, to Libya, Iraq, Iran and the PLO.<sup>342</sup> The nine comandantes have also made Nicaragua available as a more generalized sanctuary for radical terrorist attacks.<sup>343</sup> Non-Central American groups cur-

<sup>339</sup> One possibility for improvement would be for all sides to accept the standards of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Dec. 12, 1977, reprinted in 16 ILM 1442 (1977).

<sup>340</sup> Although Guatemala has had a poor human rights record, the Mejía Government has been moving toward democratic pluralism and improved standards of human rights. See BUREAU OF PUBLIC AFFAIRS, DEP'T OF STATE, CURRENT POLICY NO. 655, THE NEED FOR CONTINUITY IN U.S. LATIN AMERICAN POLICY 3 (1985). Costa Rica, of course, has always had one of the best records in the world on human rights.

<sup>341</sup> Their haste in doing so seems to reflect a calculation that the unique circumstances that permitted the comandantes to take power in Nicaragua would not last long, and perhaps also a burst of ideological fervor following the first successful Cuban-style takeover of a Latin American country since Castro began advocating that strategy more than 25 years ago.

<sup>342</sup> Radical regimes do not in all cases subscribe to a common ideology. Some, such as Cuba, are motivated by Marxism-Leninism; others, such as Iran under the Ayatollah Khomeini, by a religious vision; and still others, such as Libya under Muammar Qaddafi, by a unique blending of nationalism and a charismatic leader. Despite substantial differences, in large measure they share the symptoms of what I have called the "radical regime syndrome." For details, see Moore, *supra* note 4.

<sup>343</sup> See, e.g., C. STERLING, *supra* note 2; see also SANDINISTAS AND MIDDLE EASTERN RADICALS, *supra* note 8. According to this report:



rently operating from Nicaragua include: Colombia's M-19 (the terrorist group that recently took hostage the Colombian Supreme Court, which resulted in the death of 11 members of the Court), the Argentine Montoneros, the Uruguayan Tupamaros, the Basque ETA, the Palestine Liberation Organization, Italy's Red Brigades, West Germany's Baader-Meinhof gang and the Irish Republican Army.<sup>344</sup>

The strategy of covert and combined political-military attack that undergirds this secret war is a particularly grave threat to world order. By denying the attack, the aggressors create doubts as to its existence; and by shielding the attack with a cloud of propaganda and misinformation, they focus world attention on alleged (and sometimes real) shortcomings of the victimized state and the permissibility of defensive response. The result is a politically "invisible attack" that avoids the normal political and legal condemnation of aggressive attack and instead diverts that moral energy to condemning the defensive response. In a real sense, the international immune system against aggressive attack becomes misdirected instead to defensive response.

Aggressive attack—particularly in its more frequent contemporary manifestation of secret guerrilla war, terrorism and low-intensity conflict—is a grave threat to world order wherever undertaken. That threat is intensified, however, when it is a form of cross-bloc attack in an area of traditional concern to an opposing alliance system. That is exactly the kind of threat presented by an activist Soviet-bloc intervention in the OAS area.<sup>345</sup>

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The FSLN government has issued Nicaraguan passports to radicals and terrorists of other nationalities, including radicals from the Middle East, Latin America, and Europe, thus enabling them to travel in Western countries without their true identities being known. PLO agents working in Central America and Panama use Nicaragua as their base of operation. The Sandinistas' willingness to provide new documentation and a base from which to travel is undoubtedly one reason why Nicaragua has become a haven for terrorists and radicals from Europe as well as Latin America.

*Id.* at 13.

<sup>344</sup> See 21 WEEKLY COMP. PRES. DOC. 876-82 (July 15, 1985) (remarks by President Reagan to ABA).

<sup>345</sup> The political and security interests of the United States and Japan, and of the other NATO, Anzus and Rio Treaty states with respect to aggressive Soviet-bloc interventions in Central America are real and substantial. They include the following considerations:

- The strategically important Panama Canal is within MiG-23 range of airfields being built in Nicaragua. The Canal is vital to regional and global trade. One-quarter of United States seaborne imports transit the Canal. In a Far East defense emergency, as much as 40% of reinforcements and defense supplies would be moved westward through the Canal. In a NATO defense emergency, western based reinforcement divisions would be moved eastward through the Canal and the Caribbean to Europe.

- Caribbean sea lanes would be more vulnerable to air and sea attack from sophisticated airfields and naval bases now being built in Nicaragua with East-bloc assistance. A substantial amount of Latin American seaborne trade and two-thirds of all U.S. seaborne trade pass through the sea lanes of the Caribbean and the Gulf of Mexico. These Caribbean sea routes carry three-quarters of U.S. oil imports and over half of U.S. strategic mineral imports. (In World War II, a mere handful of German submarines without bases in the area sank more tonnage in the Caribbean than the entire German fleet in the North Atlantic.)

The remedy for strengthening world order is clear: return to the great vision of the founders of the UN and OAS Charters. Aggressive attack, whether covert or overt, is illegal and must be vigorously condemned by the world community, which must also join in assisting in defense against such attack. At a minimum, it must be understood that an attacked state and those acting on its behalf are entitled to a right of effective defense to end the attack promptly and protect self-determination.

World order—and the Charter system—is not an equilibrium mechanism like global climate. It can be preserved only if governments and international institutions, and the men and women behind them, have the vision to understand its importance and the courage and tenacity to fight for its survival.

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- Critical refineries and oil transshipment points important to all the Americas are located throughout the Caribbean and the Gulf of Mexico.

- In a NATO defense emergency, over 50% of NATO resupplies and a substantial number of NATO reinforcements would originate from Gulf Coast ports with enhanced vulnerability to air and sea attack. The United States and NATO can ill afford a second front in the Caribbean, which could require force levels approximating those planned for NATO reinforcement.

- The Punta Huete airfield in Nicaragua can land nuclear-capable Soviet Backfire bombers and, for the first time, can make it possible to fly TU-95 "Bear" intelligence flights down the West Coast of the United States, as have been flown from Cuba on the East Coast.

- The Nicaraguan military buildup is seriously destabilizing the traditional Central American military balance. Should Nicaragua add high-performance fixed-wing aircraft to its substantial army buildup (its pilots have been training in Bulgaria for such aircraft), as has Cuba, it would be able to overwhelm any of its neighbors in a conventional attack. Even now, it poses a major problem for nations such as Costa Rica, which has maintained no military forces. Why should Nicaragua's neighbors be forced to divert resources from social goals to maintaining a regional military balance?

## EDITORIAL COMMENTS

### HAS THE INTERNATIONAL COURT EXCEEDED ITS JURISDICTION?

*arbiter nihil extra compromissum facere potest . . .*  
Justinian, *Digest* 4.8.32.21

On January 18, 1985,<sup>1</sup> the United States notified the International Court of Justice of its withdrawal from the proceedings in the *Case concerning Military and Paramilitary Activities in and against Nicaragua*.<sup>2</sup> In its notice, the United States alleged that "the Court lacks jurisdiction and competence." It contended that "the Court's decision of November 26, 1984, finding that it has jurisdiction, is contrary to law and fact."<sup>3</sup> The allegation invokes a venerable tradition in international arbitration and adjudication about the consequences of the exercise of excess jurisdiction by an international tribunal.<sup>4</sup>

#### I.

International tribunals are bodies of limited competence, empowered to adjudicate only those matters which have been submitted to them by the parties and only in the manner prescribed by their constitutive documents.<sup>5</sup> When an international tribunal purports to act beyond the authority granted to it, its acts, like those of any other entity that exceeds its authority, are null and void. Practice and scholarship have developed and refined an itemization of grounds for nullification.<sup>6</sup>

<sup>1</sup> U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the ICJ, Department Statement, Jan. 18, 1985, DEP'T ST. BULL., No. 2096, March 1985, at 64.

<sup>2</sup> Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Judgment of Nov. 26).

<sup>3</sup> Department statement, *supra* note 1, at 64.

<sup>4</sup> See generally K. CARLSTON, *THE PROCESS OF INTERNATIONAL ARBITRATION* (1946); A. BALASKO, *CAUSES DE NULLITÉ DE LA SENTENCE ARBITRALE EN DROIT INTERNATIONAL PUBLIC* (1938); J. WITENBERG, *L'ORGANISATION JUDICIAIRE, LA PROCÉDURE ET LA SENTENCE INTERNATIONALE* (1937); W. M. REISMAN, *NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS* (1971).

<sup>5</sup> Classic statements were made in *Mavrommatis*, where Lord Finlay said, "The jurisdiction of the Permanent Court rests upon consent, and without consent there is no jurisdiction over any State." *Mavrommatis Palestine Concessions*, 1924 PCIJ, ser. A, No. 2, at 42 (diss. op. L. Finlay, J.). In the same case, Judge Moore stated:

Ever mindful of the fact that their judgments, if rendered in excess of power, may be treated as null, international tribunals have universally regarded the question of jurisdiction as fundamental. . . . The international judicial tribunals so far created have been tribunals of limited powers. Therefore no presumption in favor of their jurisdiction may be indulged. Their jurisdiction must always affirmatively appear on the face of the record.

*Id.* at 60 (diss. op. Moore, J.).

<sup>6</sup> In addition to the citations in note 4 *supra*, see Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session, UN Doc. A/CN.4/92, at 105-10 (1955) (UN Pub. Sales No. 1955.V.1).

The practical problem in international law in implementing this elementary legal notion has been the general lack of political or judicial hierarchy. Hierarchies might supply another instance to review the assertion by the aggrieved party that the original tribunal had exceeded its jurisdiction. Without such a reviewing authority, there is the fear that the evil of *excès de pouvoir* will be more than matched by the evil of *judex in sua causa*.

Despite such concerns, it cannot be questioned that the demand for respect for constitutive instruments and, perforce, the sanction for violation of that respect prevail. The point can be demonstrated by examining a provision such as Article 36(6) of the Statute of the International Court (which is essentially declaratory of international arbitration law) and the way international law construes it. Article 36(6) provides: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." Given the care and detail manifested by the preceding five paragraphs of Article 36 and the comparable care heretofore applied by the Permanent Court and the International Court in construing them, it would be absurd to contend that paragraph 6 empowers the Court to decide without regard to the law in question. The very word "Court" imports a decision based on the legal expectations of the parties, not on some judicial *cadenza*.

Any possible doubt about international legal thinking on this matter was dispelled when the General Assembly of the United Nations reviewed the International Law Commission's Draft Convention on Arbitral Procedure in 1952.<sup>7</sup> The French version of Article 11, corresponding to Article 36(6) of the Statute of the International Court, described the tribunal "as the 'maître' of its own competence" and attributed to it "the widest powers to interpret the *compromis*." The Assembly objected to the breadth of that ascription<sup>8</sup> and the Commission subsequently changed "*maître de sa compétence*" to "*juge de sa compétence*" and excluded the word "widest."<sup>9</sup> Rather than injuring international arbitration and adjudication, both the Commission and the General Assembly thus made a substantial contribution to the effectiveness of international arbitration. For, as the commentary to the draft put it:

It is not the fact alone that the *compromis* may provide that the award is binding on the parties which makes it so binding. The view of States that international law makes an arbitration award binding, the circumstance that the tribunal faithfully has adhered to the fundamental principles of law governing its proceedings, these are the ultimate sources of the binding authority of an international arbitral award. States are required to take all necessary measures to carry into effect an award so rendered.<sup>10</sup>

In the final analysis, it is law that is the major factor in enforceability.

<sup>7</sup> 7 UN GAOR Supp. (No. 9) at 7, UN Doc. A/2163 (1952).

<sup>8</sup> I. SHIHATA, THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION: COMPÉTENCE DE LA COMPÉTENCE 11 (1965).

<sup>9</sup> See [1958] 1 Y.B. INT'L L. COMM'N 43-46, UN Doc. A/CN.4/SER.A/1958; for a concise summary of the debate, see I. SHIHATA, *supra* note 8, at 11 and n.4.

<sup>10</sup> Commentary, *supra* note 6, at 105.

The late Professor Scelle, the rapporteur of the *projet*, though rebuked on this point, was hardly insensitive to the problem of excess of jurisdiction. He included a provision and a procedure for it in the *projet*.<sup>11</sup> The commentary prepared by the Secretariat observed:

An international tribunal is not a court of general jurisdiction nor is it a court free from the established rules of law governing any judicial proceeding. The jurisdiction of the tribunal is determined by the agreement of the parties; it may decide only the questions submitted to it. The tribunal must decide under the rules of law applicable to it. It must conduct its proceedings in a judicial manner and with due observance of the fundamental rules of procedure.<sup>12</sup>

Thus, in its notice of January 18, 1985, the United States was not inventing, but invoking, a recognized legal doctrine inherent in the very notion of an international tribunal. Before rushing to condemn the United States for its notice of withdrawal, the reader may find it appropriate to examine, in terms of that classic theory, the Judgment that precipitated it.

## II.

Fourteen of the 16 judges sitting in *Nicaragua* found that the Court had jurisdiction to entertain the Application filed by the Republic of Nicaragua on 9 April 1984, insofar as that Application relates to a dispute concerning the interpretation or application of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua signed at Managua on 21 January 1956 on the basis of Article XXIV of that treaty.<sup>13</sup>

Article XXIV(2) of the FCN Treaty provides: "Any dispute between the Parties as to the interpretation or application of the present Treaty not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice unless the Parties agree to settlement by some other specific means."<sup>14</sup> One of the judges who dissented from the Court's holding on this ground found that there had been no negotiations.<sup>15</sup> The majority, for some reason not apparent on the face of the Judgment, ignored Article XXI(1)(d) of the Treaty, which provides: "The present Treaty shall not preclude the application of measures: . . . (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests. . . ."<sup>16</sup> In the face of such explicit language, it is difficult to see how any tribunal could

<sup>11</sup> Art. 30, *id.*

<sup>12</sup> *Id.*

<sup>13</sup> 1984 ICJ REP. at 442, para. 113.

<sup>14</sup> *Id.* at 427, para. 81.

<sup>15</sup> Separate Opinion of Judge Ruda, *id.* at 452, 454, para. 12.

<sup>16</sup> Emphasis added. Judge Nagendra Singh was able to dispel for himself any lingering disquiet on this point by finding significance in the fact "that the jurisdictional clause of Article XXIV of the Treaty does not specify the exclusion of Article XXI from the Court's jurisdiction." Separate Opinion of Judge Nagendra Singh, *id.* at 444, 446-47.

use the Treaty to subject to its own jurisdiction matters that had been expressly excluded.

A smaller, but still substantial, majority of 11 judges concluded that the jurisdictional requirements of Article 36(2) of the Statute of the International Court of Justice were fulfilled by the interlocking and sufficiently congruent Declarations of Nicaragua and the United States.<sup>17</sup> Nicaragua, in 1929, had submitted a communication that was the first step in making a unilateral declaration of unconditional submission to the jurisdiction of the Court when it signed the Protocol. But it never submitted the requisite ratification, despite the fact that it was duly notified that this deficiency rendered its effort at making a declaration nugatory.<sup>18</sup> Indeed, Nicaragua itself seems to have been aware of the problem, for it had not relied on that stillborn communication in its own adjudication with Honduras in the International Court in 1960, preferring instead a special agreement under Statute Article 36(1).<sup>19</sup>

Yet the Court found that the incomplete communication of 1929 had been completed, repaired and transformed into a declaration by virtue of Article 36(5) of the Statute of the International Court.<sup>20</sup> That provision<sup>21</sup> had been designed to transfer to the new Court declarations that had been made with regard to the Permanent Court of International Justice and that were still in force. The majority of 11 judges accomplished this feat by characterizing the 1929 communication (which could not, under the terms of the instrument with regard to which it was submitted, be a declaration) as a "declaration"<sup>22</sup> and by concluding that this "declaration" was valid but not binding. They then interpreted Article 36(5) as having been designed to transform and render binding such theretofore uncompleted and defective "declarations."<sup>23</sup>

In fact, the legislative history of the Court's Statute indicates unmistakably that this was not the intention of the transitional regime created by Article 36(5). The subcommittee of the Committee of Jurists, meeting in Washington in 1945, was quite explicit: "The subcommittee calls attention to the fact that many nations have heretofore *accepted* compulsory jurisdiction under the 'optional clause'. The subcommittee believes that provision should be

<sup>17</sup> *Id.* at 442, para. 113.

<sup>18</sup> *Id.* at 403-04, para. 25.

<sup>19</sup> Case concerning the Arbitral Award made by the King of Spain on 23 December 1906 (*Hond. v. Nicar.*), 1960 ICJ REP. 192 (Judgment of Nov. 18).

<sup>20</sup> 1984 ICJ REP. at 404-08, paras. 27-35.

<sup>21</sup> Article 36(5) provides:

Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

<sup>22</sup> 1984 ICJ REP. at 403-04, para. 25.

<sup>23</sup> *Id.* at 405-08, paras. 29-35. For confirmation of its interpretation, the Court relied on the "conduct" of international organizations (*id.* at 408-09, para. 36). For an examination of the fallacy in this reasoning, and its implications, see M. Reisman, *Dissemination of Information by International Organizations: Reflections on Law and Policy in the Light of Recent Developments*, VICT. U. WELLINGTON L.J. (forthcoming).

made at the San Francisco Conference for a special agreement for continuing these acceptances *in force* for the purpose of this Statute."<sup>24</sup>

A majority of 11 on the Court found that the 6-month clause present in the U.S. Declaration, but absent in the now validated Nicaraguan one, bound the United States and defeated its efforts to terminate or modify its Declaration with immediate effect.<sup>25</sup> As for the restriction in the U.S. Declaration of matters coming under multilateral treaties, the Court dismissed it on the ground that even though the claims of Nicaragua may now have been enshrined in the texts of conventions, they originally derived from customary and general international law.<sup>26</sup> Some of these latter findings, while certain to generate scholarly and policy dispute, are not inconsistent with prior jurisprudence. Others are very problematic. But the Court's creation of a valid Nicaraguan declaration is so ill-founded in the facts, in the law and in the Court's own jurisprudence as to constitute a ground of nullity. In international law, as elsewhere, it takes two to tango. Hence, even if the Court could properly find that an appropriate U.S. declaration was in force, it should still have found itself without jurisdiction in this case.

All of the judges rejected the United States arguments of admissibility.<sup>27</sup> In a fragile international political system that seeks to protect itself by insulating matters of vital interest to the major powers from review *even by the Security Council*, it is arguable, of course, that those very states which sought such insulation may still submit themselves to a decisional entity that has no special mechanisms for protecting their interests. But surely a prudent tribunal would look for a high degree of clarity in the waiver of those very rights which international law has vouchsafed them. It is not the finding of admissibility of issues *in abstracto* in this case that is puzzling, but its finding when all of the other grounds of jurisdiction are so tenuous and forced.

Nor was this case free from some disquieting procedural pathologies. El Salvador, which had sought to intervene under Article 62 of the Statute, was denied that option by the Court. The decision itself tells us little.<sup>28</sup> More significant is the fact that El Salvador was denied a hearing on the matter.<sup>29</sup> The Friendship, Commerce and Navigation Treaty, on which 14 judges relied to find jurisdiction, had not been invoked by Nicaragua in its original Application and was scarcely discussed during the oral proceedings. Indeed, Judge Oda, in his separate opinion, remarked that there was but a single reference to it by the Agent of Nicaragua as "a subsidiary basis for the

<sup>24</sup> Doc. Jurist 41, G/31, 14 UNCIO Docs. 289 (1945) (emphasis added), cited in Dissenting Opinion of Judge Schwebel, 1984 ICJ REP. at 558, 571, para. 18, and Separate Opinion of Judge Jennings, *id.* at 533, 536.

<sup>25</sup> 1984 ICJ REP. at 421, para. 65.

<sup>26</sup> *Id.* at 424, para. 73.

<sup>27</sup> *Id.* at 429-41, paras. 84-108.

<sup>28</sup> Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Declaration of Intervention, 1984 ICJ REP. 215 (Order of Oct. 4).

<sup>29</sup> See Separate Opinion of Judges Ruda, Mosler, Ago, Jennings and de Lacharrière, *id.* at 219.

Court's jurisdiction."<sup>30</sup> The "unduly short time" allowed the judges to prepare and expand separate and dissenting opinions was also noted.<sup>31</sup> The unusual haste was particularly puzzling, as interim measures, largely accomplishing the basic remedy sought by the applicant, had already been ordered against the defendant.<sup>32</sup>

Even a review as summary as this indicates that the United States grievance that the Court's finding of its jurisdiction "is contrary to law and fact" was far from implausible.

### III.

Whatever one's views of the merits of the political controversy dividing the United States and Nicaragua, it is well to remember that the International Court must continue to operate after this dispute is resolved and *Military and Paramilitary Activities* slips deeper and deeper into the lengthening crimson queue of *ICJ Reports*. In this longer view, one criterion of appraisal of each of the Court's judgments and opinions is its constitutive impact on the international judicial function itself,<sup>33</sup> a ubiquitous and inescapable consideration that is only sometimes treated explicitly.<sup>34</sup> The performance of that function depends on the confidence of states; the loss of that confidence poses the gravest threat to this institution. The point has never been put better than in Chief Justice White's dictum:

Discretion or compromise or adjustment, however cogent might be the reasons which would lead the mind beyond the domain of rightful power, and however much they might control if excess of authority could be indulged in, can find no place in the discharge of the duty to arbitrate a matter in dispute according to the submission and to go no further. No more fatal blow could be struck at the possibility of arbitration for adjusting international disputes than to take from the submission of such disputes the element of security arising from the restrictions just indicated.<sup>35</sup>

Fidelity to procedures is an important communication to states in this regard, for, as Judge Koretsky put it, in international adjudication, they are not "simply technical. . . . Their strict observance in the International Court of Justice . . . is even more important than in national courts."<sup>36</sup> It is difficult

<sup>30</sup> Judgment of Nov. 26, Separate Opinion of Judge Oda, "Opening Remarks," 1984 ICJ REP. at 471, 472.

<sup>31</sup> E.g., by Judge Oda, *id.*

<sup>32</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Provisional Measures, 1984 ICJ REP. 169 (Order of May 10). See, in this regard, Reisman, *Accelerating Advisory Opinions: Critique and Proposal*, 68 AJIL 648 (1974).

<sup>33</sup> W. M. REISMAN, *supra* note 4, at 861.

<sup>34</sup> Case concerning the Northern Cameroons (Cameroon v. UK), Preliminary Objections, 1963 ICJ REP. 15, 65 (sep. op. Spender, J.) and 97 (sep. op. Fitzmaurice, J.) (Judgment of Dec. 2).

<sup>35</sup> 1914 FOREIGN RELATIONS OF THE UNITED STATES 1000, 1014, *cited in* K. CARLSTON, *supra* note 4, at 64.

<sup>36</sup> Northern Cameroons, Declaration of Judge Koretsky, 1963 ICJ REP. at 39, 40.



to avoid the impression that in the Judgment of the Court of November 26, 1984, its image of probity and its record of fidelity to the intentions of those states which have entrusted to it a general commitment to adjudicate were seriously injured.

The political and human impulse to get involved in a controversy like this is understandable. But before yielding to it, one would do well to reflect again on the words of Secretary of State Root, instructing the American delegates to the Hague Conference of 1907, at the very dawn of modern international adjudication:

There can be no doubt that the principal objection to arbitration rests not upon the unwillingness of nations to submit their controversies to impartial arbitration, but upon an apprehension that the arbitrations to which they submit may not be impartial. It has been a very general practice for arbitrators to act, not as judges deciding questions of fact and law upon the record before them under a sense of judicial responsibility, but as negotiators effecting settlements of the questions brought before them in accordance with the traditions and usages and subject to all the considerations and influences which affect diplomatic agents. The two methods are radically different, proceed upon different standards of honorable obligation, and frequently lead to widely differing results. It very frequently happens that a nation that would be very willing to submit its differences to an impartial judicial determination is unwilling to subject them to this kind of diplomatic process.<sup>37</sup>

The United States, by its withdrawal of January 18, 1985, has not helped the Court. Nor will the Court be helped by the termination of the United States Declaration and probable emendation of the declarations of other states, now made necessary by the novel and expansive jurisprudence implicit in the Judgment of November 26, 1984. But before condemning the United States for what appears to be a retreat from international adjudication and before greater injury is done to international adjudication, international lawyers might do well to read the Judgment again in the light of the classic theory of public international jurisdiction. For it is an affirmation and not a repudiation of law to reject a decision by a tribunal that had no jurisdiction to make such a decision.

W. MICHAEL REISMAN\*

<sup>37</sup> Instructions to the American Delegates to the Hague Conference, May 31, 1907, 1907 FOREIGN RELATIONS OF THE UNITED STATES, pt. 2, at 1128, 1135.

\* I acknowledge with gratitude the critical comments and suggestions of my colleague Myres S. McDougal.

## UK FOREIGN AFFAIRS COMMITTEE REPORT ON THE ABUSE OF DIPLOMATIC IMMUNITIES AND PRIVILEGES: GOVERNMENT RESPONSE AND REPORT

After the killing of Woman Police Constable Fletcher in St. James Square, London, by shots fired from the windows of the Libyan People's Bureau,<sup>1</sup> the Secretary of State for Foreign and Commonwealth Affairs announced in the House of Commons that he had "instituted a full Review of the Vienna Convention, its operation and enforceability."<sup>2</sup> He also indicated that he would welcome the views of the Foreign Affairs Committee. The Committee's report, *The Abuse of Diplomatic Immunities and Privileges*, was published on January 23, 1985 and was reviewed in this *Journal*.<sup>3</sup> Her Majesty's Government has now published a White Paper<sup>4</sup> that contains both its response to the report of the Foreign Affairs Committee and the results of its own study ordered by the Foreign Secretary.

The Foreign Affairs Committee had made a detailed set of recommendations.<sup>5</sup> In a very rare act, the Government has indicated that it accepts all the major recommendations made by the committee.<sup>6</sup> Thus, the Government has accepted that it would be difficult to achieve any restrictive amendment to the Vienna Convention, that it would be of doubtful net benefit to do so, and that it should "not . . . concentrate on amendment of the Convention as a major element in new policies to restrict abuse of immunities"; that a firmer policy in the application of the Convention should be preserved; that electronic scanning of diplomatic bags should take place on specific occasions if the need arises; that it should be made clear to all diplomats that they may well be required to leave the country if they violate the criminal law (other than in minor matters); that the Government should be "significantly readier than in the past" to limit the size of a mission where there is cause for significant concern about the overall nature of the mission's activities; and that the Foreign and Commonwealth Office should take all steps, as early as possible, to inform itself about those arriving to take up mission posts.<sup>7</sup>

On the matter of the outrage at the Libyan People's Bureau, the White Paper, while accepting those parts of the committee's conclusions that supported the Government's handling of events after the shooting, rejected the criticisms that had been made about the handling of relations with the Libyan

<sup>1</sup> Apr. 17, 1984.

<sup>2</sup> May 1, 1984.

<sup>3</sup> *The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience*, 79 AJIL 641 (1985), by this writer, who was specialist adviser to the Foreign Affairs Committee. For another analysis and commentary, see Cameron, *First Report of the Foreign Affairs Committee of the House of Commons*, 34 INT'L & COMP. L.Q. 610 (1985).

<sup>4</sup> CMD. 9497, MISC. NO. 5 (1985) [hereinafter cited as White Paper].

<sup>5</sup> H.C. FOREIGN AFFAIRS COMMITTEE, PAPER NO. 127, FIRST REPORT, THE ABUSE OF DIPLOMATIC IMMUNITIES AND PRIVILEGES, REPORT WITH AN ANNEX; TOGETHER WITH THE PROCEEDINGS OF THE COMMITTEE; MINUTES OF EVIDENCE TAKEN ON 20 JUNE AND 2 AND 18 JULY IN THE LAST SESSION OF PARLIAMENT, AND APPENDICES, at xxxviii-xl (1984) [hereinafter cited as Report].

<sup>6</sup> White Paper, *supra* note 4, at 3.

<sup>7</sup> Report, *supra* note 5, para. 127.

People's Bureau since 1980.<sup>8</sup> The White Paper states that "[t]he Government believe that some of these points have been made with hindsight and are based on judgments formed on evidence not available at the relevant time. Some do not fully reflect the evidence available."<sup>9</sup>

The conclusions of the Government are as follows (the paragraph references being to the Foreign Affairs Committee's report):

85. The Government share the concern expressed by the Committee on the abuse of diplomatic immunities and, following a full review of the operation of the Vienna Convention, have accepted all the major recommendations in their Report. The main conclusions are as follows:

(a) the Government agree with the Committee that it would be wrong to regard amendment of the Vienna Convention as the solution to the problem of abuse of diplomatic immunities in view of the difficulties of achieving any restrictive amendment and the doubtful net benefit to the UK of so doing (para 11);

(b) the Government appreciate the Committee's welcome and support for the efforts made to seek close co-operation with Western Governments and for the progress so far achieved. They will continue to press for further improvement in international co-operation (para 13(a)) and, where appropriate, work for modifications to existing international rules to restrict abuse of immunities (para 13(b));

(c) the Government have implemented a firmer policy towards application of the Vienna Convention as recommended by the Committee (para 17);

(d) the Government have revised and strengthened their requirements and procedures on the notification of staff of diplomatic missions (para 28);

(e) the Government have used their discretion in the past year to limit the size of individual missions and will continue to do so on a case by case basis (para 30);

(f) the Government have taken administrative measures to deal with abuse of diplomatic premises and to limit the extent of mission premises in accordance with international law and practice (para 39(a)-(c)). Proposals for legislation to control in exceptional circumstances the acquisition and disposal of premises are under consideration (para 39(d));

(g) the Government accept that demonstrations outside diplomatic missions should be allowed so long as they do not imperil the safety or efficient work of the mission (para 39(e)). Consultation by the police with the Home Office and FCO on any change of policy over the policing of demonstrations will be improved (para 40);

(h) the Government share the Committee's concern on the abuse of diplomatic bags. Any formal restriction on the content and use of bags would be difficult to achieve and not necessarily desirable because of the reciprocal implications for the security of British bags (paras 43-46). Prompt and firm action will be taken where the evidence is good that the contents of a bag might endanger national security or the personal safety of the public or of individuals (para 48). Administrative measures on the identification and handling of bags have been tightened (para 49);

<sup>8</sup> *Id.*, para. 127(b), and paras. 65-105.

<sup>9</sup> White Paper, *supra* note 4, para. 82.

(i) the Government are ready to scan bags and to record their weight and size where there are specific grounds for doing so but not as a matter of routine (para 53 and 56);

(j) the Government have clarified the guide-lines on breaches of criminal law by diplomats and their families and the criteria for dealing with them. More stringent standards are being applied (paras 67-71);

(k) the Government are taking stronger action to deal with parking offences (para 80);

(l) the Government accept some, but not all, of the Committee's conclusions on events relating to the Libyan People's Bureau (paras 81-83);

(m) the Government accept the Committee's conclusions on the handling of the attempted abduction of Mr. Umaru Dikko (para 84).

Subsequently, a diplomat of the Syrian Embassy in London was notified that he would be required to leave if he continued to refuse to obey a court order to vacate residential premises. The owners were unable to secure vacant repossession of their own home and their lawyers seemed to assume that the diplomat would claim immunity from execution of the court order.<sup>10</sup> The matter was ultimately resolved by the decision of the Syrian Embassy itself to send the offending diplomat home.

The White Paper contains much that is of interest to the student of diplomatic privileges and immunities. The view is taken that the Vienna Convention has become, even for nonparties, the modern customary law on the matter, so that even if termination of acceptance were legally possible, a state would be left in substantially the same position.<sup>11</sup> In an interesting passage, it is explained that problems of abuse arise mainly out of the interpretation of Article 7 of the Convention, which states that "the sending State may freely appoint the members of the staff of the mission."<sup>12</sup> The White Paper characterizes those problems as follows:

(a) notification as diplomatic staff of persons who should more properly be regarded as administrative and technical staff; and apparent disproportion in certain cases between diplomatic staff and administrative and technical staff;

(b) notification of staff (such as students and teachers) whose functions do not appear properly or fully to fall within those of a diplomatic mission;

(c) imprecise definition of "members of the family forming part of the household";

(d) notification as administrative and technical staff, entitled to immunities and privileges, of persons originally appointed as locally engaged staff (whom we would treat as permanently resident and therefore not so entitled);

<sup>10</sup> This case is somewhat puzzling, as it seems that the diplomat concerned had used the English courts earlier to secure a review of his rent; and it is at least arguable that he had thereby waived his immunity.

<sup>11</sup> White Paper, *supra* note 4, para. 10.

<sup>12</sup> This is partly circumscribed by the *persona non grata* provision in Article 9, and the authority to limit the size of a mission provided for in Article 11.

(e) failure by missions to reclassify members of diplomatic or administrative and technical staff (or their dependants) who have become UK nationals or permanently resident, e.g. following marriage to British citizens.

We have also been concerned about the employment as locally engaged mission staff of persons who would not otherwise be permitted to stay and work in the UK. These include members of the service staff, e.g. chauffeurs and cleaners, who are thereby able to evade the enforcement of immigration rules.<sup>13</sup>

The White Paper points out that the <sup>a</sup>Vienna Convention contains no objective definition of staff categories, and that checks after notification thus usually have to relate to such questions as nationality, residence and family status: "[I]t is virtually impossible in most cases for the FCO to tell whether a person should more properly be described as a diplomat or as a member of the administrative and technical staff or indeed as a member of the mission at all."<sup>14</sup> The answer has to lie in information coming from other sources (including exchanges of information within the European Community) and in the willingness to use the *persona non grata* sanction where appropriate.

Where visa requirements exist for certain countries, it is easier for prior checking to be carried out on those expecting to take up appointments in diplomatic and consular missions in the United Kingdom.<sup>15</sup> The White Paper suggests that a wider system of required prior notification would not be enforceable under the Vienna Convention (going beyond the terms of Article 10(2))<sup>16</sup> and would in any event be cumbersome, without necessarily providing the information required. By contrast, "the visa requirement effectively provides advance notice in cases where it is most likely to be needed."<sup>17</sup> Further control is now exercised by the practice of asking missions to specify whom a new arrival is replacing, or, if there is no such person, the functions of the new appointee.

As the Government explains, the Vienna Conference sought, but failed, to provide a definition of "members of the family forming part of the household." On the vexed question of adult children, the United Kingdom practice is to accept children aged 18 or over, provided they are clearly resident with the members of the mission and are not engaged in employment on a permanent basis.<sup>18</sup> In an interesting comment, the White Paper notes, "Our acceptance or rejection of a notification is not in itself conclusive of status. In doubtful cases it is for a court to rule on the status of a dependant should he for instance be accused of a criminal offence."<sup>19</sup>

The White Paper also has some interesting observations to make on the size of the mission. It is explained that involvement in espionage or terrorism

<sup>13</sup> White Paper, *supra* note 4, para. 19.

<sup>14</sup> *Id.*, para. 21.

<sup>15</sup> *Id.*, para. 22.

<sup>16</sup> Which provides for it only "where possible."

<sup>17</sup> White Paper, *supra* note 4, para. 22.

<sup>18</sup> In exceptional circumstances, other relatives, e.g., dependent parents living with the member of the mission, are accepted.

<sup>19</sup> White Paper, *supra* note 4, para. 25.

is likely to lead to the imposition of specific ceilings "since the mission has no need for those 'diplomats' whose activities are not properly diplomatic."<sup>20</sup> Thus, a ceiling was placed on the size of the Soviet Embassy in 1971 following the expulsion of 105 Soviet officials for "inadmissible activities." In September 1985, a more subtle approach was tried: 25 Soviet nationals (some diplomats, some not) were required to leave for unacceptable activities. However, the Government took the view that a certain level of representation was required for Soviet-British diplomatic relations. The ceiling for diplomats thus went up from 39 to 46, while the overall ceiling for Soviet representation in London was reduced by 23<sup>21</sup> to 211. After the Soviet Union in response expelled an identical number of British nationals from the Soviet Union, 6 more Soviets were required to leave and the overall ceiling for Soviet representation was further lowered by 6 to 205.

The White Paper accepts that the pattern of behavior of certain missions can indicate that ceilings should be lowered before any offenses or incidents occur. The Foreign Affairs Committee had found that the pattern of behavior at the Libyan Bureau from 1980 to 1983 was such that the Government should have exercised its right under Article 11 of the Convention. The White Paper insists, however, that the incidents were not of "comparable gravity to those of 1984 which would have provided a clear justification of measures against the Bureau."<sup>22</sup> This clearly remains a matter of opinion.<sup>23</sup> Nevertheless, the White Paper correctly points out that the number of persons in the UK mission to the country concerned cannot of itself determine the number of diplomats from that country who should be permitted in London:

Diplomatic missions in London are in many cases larger than the corresponding British missions overseas. This reflects the particular importance of London as an economic, financial and political centre, including the Headquarters of various international commodity organizations. Moreover, some missions use London as a base from which to cover other countries in addition to the UK.<sup>24</sup>

The White Paper contains a particularly interesting section on diplomatic premises, including aspects that do not normally reach public attention. Problems relating to acquisition of title, location, tourist offices, rating relief, and so forth are identified,<sup>25</sup> and solutions proposed.<sup>26</sup> Important among the latter is the decision no longer to accord diplomatic status to separate tourist offices.<sup>27</sup> There are indications that legislation is being considered to

<sup>20</sup> *Id.*, para. 31.

<sup>21</sup> Two of the 25 identified spies were working in international organizations in London and were not included in the reduction.

<sup>22</sup> White Paper, *supra* note 4, para. 82(ii).

<sup>23</sup> And the present writer remains of the view that the events listed in paragraph 81 of the Foreign Affairs Committee's report were properly to be characterized as of undoubted gravity.

<sup>24</sup> White Paper, *supra* note 4, para. 31(c).

<sup>25</sup> *Id.*, paras. 34-38.

<sup>26</sup> *Id.*, para. 39.

<sup>27</sup> Most other countries have never, in fact, interpreted "premises of a mission" to include tourist offices, and thus have never given them diplomatic status.

control the acquisition and disposal of diplomatic premises in London in a manner in conformity with the Vienna Convention.<sup>28</sup>

Readers of this *Journal* are referred also to the wealth of other interesting information and argument, including on the questions of the diplomatic bag and immunity from civil and criminal jurisdiction, contained in the Government's report.<sup>29</sup> All these matters relating to the interpretation and administration of the Vienna Convention are to be set against attempts at the political level to secure international cooperation against terrorism and diplomatic abuse. Efforts within the Council of Europe and the European Economic Community are recounted, and no doubt less-public cooperation on these matters has also been tightened between like-minded nations.

Taken together, the report of the Foreign Affairs Committee and the Government's report provide a fascinating example of "international law in action," evidencing problems of interpretation and implementation that arise in respect of a multilateral treaty, and suggesting appropriate responses within the framework of the international treaty obligation.

ROSALYN HIGGINS

<sup>28</sup> The White Paper here makes specific references to the powers under the United States Foreign Missions Act of 1982, 22 U.S.C. §§4301-4313 (1982); see *Contemporary Practice of the United States*, 78 AJIL 430-35 (1984), and 79 AJIL 1050-01 (1985).

<sup>29</sup> See White Paper, *supra* note 4, paras. 41-56, and 57-73.

## NOTES AND COMMENTS

### IN MEMORIAM: PROFESSOR JULIUS STONE (1907–1985)

Julius Stone inspired three generations of law students. In the ensuing two memorials, he is remembered by a senior legal scholar and by a recent graduate. The two perspectives give depth to the profession's perception of loss.

#### I.

Julius Stone, the world-renowned international law publicist and legal philosopher, having just completed a new book on common law precedent, and while still working on two others, one on the law of evidence and the other on the establishment and freedom of worship clauses of the United States Constitution, died on Tuesday, September 3, 1985 after a long illness. At 78 years of age, he was still in harness as a professor of law of the University of New South Wales after an academic career spanning some 57 years. He had taught at the University of New South Wales since 1973, following his retirement, at the end of 1972, from the Challis Chair of International Law and Jurisprudence of the University of Sydney.

Julius Stone was born in 1907 in the English North Country city of Leeds to a Jewish family of very modest means. He was one of the earliest students in the United Kingdom to win a state scholarship to Oxford where he went to read history. But he switched to law on the recommendation of his history tutor, A. T. Atkinson. A most serendipitous event then occurred: in making this change, he interviewed Dr. Geoffrey Cheshire, who took him as a pupil, and so his most distinguished legal career began under the aegis of a most distinguished tutor—later to occupy Blackstone's chair (the Vinerian Professorship of the Common Law) at Oxford. Stone remained in touch with Cheshire until the latter's death at the age of 92.

After graduating from Oxford, Stone took the BCL externally and was later awarded the DCL. Thereafter, he went to Harvard as a Rockefeller Fellow in Social Science and taught there for some 3 years (1933–1936) as an assistant professor. During his period at Harvard, he was a cofounder of the Fletcher School of International Law and Diplomacy and taught there as well as at Harvard Law School. It was at Harvard that the seminal ideas took root that later blossomed into *The Province and Function of Law*. (He returned to the Fletcher School as a visiting professor of law in 1949, at which time he was also a visiting professor at New York University School of Law.)

In 1936 Stone went back to England where for 3 years he gained practical legal experience in a solicitor's office in Leeds. At this time, he was also lecturer in law at Leeds University. In 1938 he was appointed professor of law and dean at the University of New Zealand (Auckland); then, in 1942, he was called to the Challis Chair of International Law and Jurisprudence



at the University of Sydney. In the course of his long and illustrious career, Stone filled visiting distinguished professorships at many universities in this country, including the Bemis Chair of International Law (which he occupied as a visiting professor at Harvard in 1956–1957). After his retirement in 1972, he was designated emeritus professor at Sydney University and distinguished professor at the University of California Hastings Hall College of Law, in addition to his appointment at the University of New South Wales. Stone occupied many distinguished visiting chairs in other parts of the world, for example at the Universities of New Delhi and Jerusalem. He lectured at the Hague Academy of International Law and received numerous orders, fellowships, awards and prizes. He was an official observer for the International Commission of Jurists at the trial of Adolf Eichmann in Jerusalem.

It was from his base of the Challis Chair of International Law and Jurisprudence that Julius Stone established his reputation for greatness as a teacher, publicist, polemicist and, above all, scholar of originality, power and insight. He was an innovative giant in both of the fields for which the Challis Chair had originally been established. Clearly, Sydney University paid him a great compliment when, after his retirement, it divided his chair into two, one for international law and the other for jurisprudence, and filled each with a distinguished scholar.

It is impossible, of course, to say which will become the more lasting contribution, his writings in legal philosophy or his work in international law. Indeed, the question itself may appear to be invidious, suggesting perhaps that his work in both may not be equally lasting. Let it suffice for now to say that his contributions have been great and will endure. Moreover, his philosophical insights suffused his knowledge of positive international law with light. Equally, his clarification of the frequently hidden issues arising in the international legal process reciprocally provided grist to the mill of his philosophical speculations.

In his very productive career, Julius Stone wrote some 34 books—amongst them the aforementioned *Province and Function of Law*, which first appeared in 1946 and immediately attracted wide and highly favorable attention throughout the world. This seminal work was later expanded into the great philosophical trilogy, in effect serially presented to his public in the 1960s: *Legal System and Lawyers' Reasonings* (1964), *Human Law and Human Justice* (1965) and *Social Dimensions of Law and Justice* (1966). Sir Zelman Cowen has characterized these books "as the most comprehensive account yet written of jurisprudential thought."

Stone's perception of progress and development in human society was that it is not inherently necessary, but is accompanied by frequent backsliding. He saw it as arising from a constant struggle of light against darkness, wisdom against savagery, civilization against the jungle and justice against naked power. This led him to formulate the story of justice as that of the struggle for survival and development of what he termed "enclaves of justice" where human relations are brought under control against violence and, in addition, regulated by "some kind of judgment which, for want of a better word we call justice." He saw in the development of the due process clause in the

United States, which "has carried the notion of justice in law to the highest degree ever," a clear example of this theme. Yet, even in this country, that enclave of justice "is surrounded by wilderness." In international relations, too, he perceived a nascent "enclave of justice" in the incipient, but growing, global concern for a worldwide minimum standard of dignity and subsistence. While international aid and the transboundary concern for human rights reflect the emergence of a rudimentary enclave of justice in the international arena, it remains fragile. Furthermore, it is surrounded and threatened by the inherent enmities and violence of the present international system.

It is not only as a great publicist that Julius Stone will long be remembered. He aroused enthusiasm and respect for his thoughts in the hearts and minds of over eight thousand students. He is remembered by all of us as a stimulator of thought. The world will miss this great scholar, inspiring teacher and good and generous man.

L. F. E. GOLDIE\*

## II.

To number, and indeed to pay homage to, the many achievements of Julius Stone would take more space than any brief memorial or obituary on him would allow. His *Festschrift*<sup>1</sup> and, in particular, the bibliography in it of his published writings are an ample record. Not only as a scholar but as a teacher, Julius Stone gave so freely of his genius to so many generations of students that any one personal experience could not be a sufficient memorial.

I was a student of the teacher we truly honored with the title "Professor" in the last "Theories of Justice" class taught by him at the University of New South Wales Law School. I was honored, in turn, by much patient and individual attention, even outside the normal realms of class and consulting hours. Professor Stone nurtured and gave direction to my interest in international law, particularly in the affairs of the Middle East. His research and publications on the Israeli-Arab conflict injected the thorough and most scholarly pen of Julius Stone into a controversial issue so often clouded by hyperbole and less than disciplined citations to international legal authorities.

As he had done with so many generations before mine, Professor Stone encouraged his students to delve more than deeply into problems that interested them. Yet this gracious, then 75-year-old genius would never be satisfied with a student's first response to the questions he set for our studies. It was never enough to answer the question "how?" without critically analyzing "why." I remember most clearly a long discussion on the antidiscrimination law that had been introduced in Australia pursuant to the Con-

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<sup>1</sup> LEGAL CHANGE, ESSAYS IN HONOUR OF JULIUS STONE (A. R. Blackshield ed. 1983).

vention on the Elimination of All Forms of Racial Discrimination, which had given rise to a constitutional challenge in the High Court of Australia. Professor Stone would not be content with the question-begging solutions and, of course, the illusory categories of reference utilized by those questioning the validity of the new law. He would patiently explain to us that the search for equality was a confusion of means and ends. When international law sought to prevent discrimination and its often horrible consequences, there was really an issue of deeper justice involved. It was not enough that one should treat each of one's neighbors with an equal amount of respect if one did not accord to all of those neighbors that element of dignity for which human beings seeking the "just" society clamored.

As is reflected in his last major work, *Visions of World Order: Between State Power and Human Justice* (1984), and in his earlier contribution to *The Future of the International Legal Order* edited by Professors Falk and Black, entitled *Approaches to the Notion of International Justice*, it is only the constant and constructive clamoring for change throughout the human constituency that gives law its life and permits the search for justice to continue.

I am grateful, indeed, for this opportunity to honor a gentleman who contributed so much to the many members of the international legal community. Even though I had recently moved from Australia to the United States, he corresponded with me until a few weeks before his sad passing. Indeed, the day before he died, he gave a full feature interview with the *Sydney Morning Herald*. Notwithstanding his long fight with cancer, Julius Stone's scholarly pen did not leave his hand until his dying day.

In closing, I feel it apt to share with the readers of the *American Journal of International Law* a message from Julius Stone to his students of both international law and jurisprudence and the many generations to follow: "A society in which the questionings of justice cease to be a constant prod and perplexity would not be human in any sense that matters."<sup>2</sup>

To our scholar, teacher and friend who imbued us all with a love for the law and a passion for justice through legal orderings: *Vale*, Julius Stone.

DAVID D. KNOLL\*

## CORRESPONDENCE

TO THE EDITOR IN CHIEF:

September 3, 1985

I met Professor Goldie several years ago when we were both taking part in a symposium on deep seabed mining, organized by the Syracuse University College of Law. At the time I was a member of the Canadian delegation to the Law of the Sea Conference. I see from Professor Goldie's recent Comment (79 AJIL 689 (1985)) that his view on the Deepsea Ventures claim has not changed over the years; nor has mine, in one important respect.

<sup>2</sup> J. STONE, *HUMAN LAW AND HUMAN JUSTICE* 355 (1965).

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Professor Goldie in his Comment analogizes between the Deepsea Ventures claim and the English law concept of *profits à prendre*. Anyone familiar with basic concepts of English law will, however, see that the analogy is highly imperfect.

If one attempts to analogize to the common law notion of *profits à prendre* in the context of seabed mining, it would seem that the analogy is more directly aimed at what is known as the *profits à prendre in gross*. This type of right existed where there was no appurtenant land or, as is requisite in the case of easements, a dominant tenement. But the concepts of easement and *profits à prendre* are similar to this extent. Both created an interest in land and, as the English Court of Appeal made clear in *Webber v. Lee* ([1882] 9 Q.B.D. 315), such a grant must be both in express and in writing. In other words, their creation of the interest flowed from the owner of the land in question and the Statute of Frauds was held to be applicable.

It seems to me, therefore, that to demonstrate a useful analogy with *profits à prendre*, the Deepsea Ventures claim would have to demonstrate that the right derived from a grant made by the owner in some form. I suppose some would argue that the owner in this case, by analogy, could be the international community; but the important point is that the *profit à prendre* does not exist *in vacuo*, in the absence of a definite grant.

Secondly, Professor Goldie also refers to the rights that existed under common law to a common pasture or common well, etc. The rights of commoners under the English legal system arose from feudal times and consisted of rights over "waste" land, very similar to a *profit à prendre*. Again, the existence of such a right required an express or implied grant from the manorial or ecclesiastical owners. Alternatively, the rights of commoners could be established by custom, but the elements establishing a local custom are quite definite, as a glance at the fourth edition of *Halsbury's Laws of England* will demonstrate.

Finally, the analysis of the concept of usufruct provided by Jolowicz in Professor Goldie's article is noteworthy. In the short quotation from Jolowicz (p. 692), reference is made to the right's being limited to using and taking the fruits of the property, "without the right of destroying or changing the character of the thing" (i.e., the property itself). The nature of seabed mining is such that once the mineral-bearing nodules are harvested, the seafloor is bare. The character of the land over which the usufruct is claimed is indeed materially altered. This is not the case of a grantee's harvesting crops or reaping fruit from trees, both of which recur in abundant forms season after season.

As I stated at the outset, when I first heard Professor Goldie use this analogy some years ago as a means of justifying the Deepsea Ventures claim, I remained skeptical. As a lawyer, I continue to be skeptical, in spite of Professor Goldie's elegant prose.

LAWRENCE L. HERMAN  
Ottawa, Canada

*L. F. E. Goldie replies:*

Mr. Herman's criticism of my *Title and Use* Comment is beside the point. In addition, his understanding of the use of domestic law analogies in the development of international law misperceives this endeavor.

His reference to the English case *Webber v. Lee* ([1882] 9 Q.B.D. 315) appears, at first blush, to be impressive. But it tells us only that agreements to shoot and divide game, when classified as *profits à prendre* in England, fall within the evidentiary requirements of section 4 of the Statute of Frauds. This statute is law in a number of common law jurisdictions; many of them differ as to its import. In addition, even if the statute were "worth a subsidy," one would surely be unduly parochial to claim that it has become accepted as public international law. My subject, by contrast, was concerned with the reception into international law of the "universally set up" distinction (Bentham) between title and use.

The second example of Mr. Herman's irrelevance lies in his emphasis on the use of the common law of *profits à prendre*. He asserts that rights such as those claimed by Deepsea Ventures can, at common law, only arise from a grant in writing and that this should apparently govern in international law, too. In fact, medieval common lawyers ruled that *res incorporales*, since they could not be the subject of a livery of seisin, "lie in grant." Be that as it may, Sir William Holdsworth, in his justly famous *History of English Law* (vol. 3, at p. 143 (4th ed. 1934)), tells us:

There are many varieties of rights to profits à prendre in alieno solo known to the common law, and most of them may be the subjects of common rights. These common rights were a necessary part of that common or open field system upon which most of the land of England was cultivated for many centuries.

While it is true that English law resorts to the legal fiction of the "presumed lost modern grant" to justify and explain customary rights of commonage, no one believes that it exists in fact. As Chief Justice Cockburn said, "a jury should be told that they not only might, but also that they were bound, to presume the existence of such a lost grant, although neither judge, nor jury, nor anyone else [except Mr. Herman?], had a shadow of a belief that any such instrument had ever existed" (*Bryant v. Foot*, [1867] 2 L.R.-Q.B. 161, 181). Moreover, it seems obvious to most that the historical fictions and idiosyncratic technicalities of the English law, like some wines, do not travel well—especially into public international law.

I must stress now, as I stressed in my Comment, that I was merely looking to English and Roman law to show "how diverse legal systems formulate the means for simultaneously enjoying distinct and disparate privileges and rights in the same object without extinguishing any of them" (p. 693), rather than using either (or any) domestic system as directly authoritative.

Finally, Mr. Herman also appears to have misunderstood reasoning by analogy, and this on two levels: on the level of logic and on the level of international law. On the level of logic, as Aristotle pointed out so long ago, reasoning by analogy is subject to the fallacy of the undistributed middle. But that has not stopped lawyers over the centuries from resorting to it. Indeed, resort to that fallacy has been an essential key to creativity in the law (reasoning syllogistically would necessarily stifle growth). By contrast, Mr. Herman's analogies are set out as carbon copies.

On the level of international law, too, Mr. Herman is as at odds with the publicists as he is with legal method. For example, Charles De Visscher tells us that the process of drawing on municipal law for the elucidation or development of international law "is never a pure and simple transfer of ele-

ments of municipal law into international law," but one of "identifying in their convergence a principle derived from common social necessity." He concludes his review of recourse to municipal law analogies with the observation that "recourse to general principles of law is up to a certain point an exercise in what is called the policy of the law" (C. De Visscher, *Theory and Reality in Public International Law* 400 (rev. ed., Corbett trans. 1968)). The policy, equally of manorial commons in medieval English law and of the world's commons in contemporary international law, is the efficient creation of commodities (wealth) out of the raw materials of the "waste"—given the available means at the time.

It is with considerable regret and hesitation that I have become impelled to take Mr. Herman to task over his many solecisms, especially as he is on record as having participated in one of the annual conferences on international law held at the Syracuse University College of Law. On the other hand, I hope that my present effort will, at last, help Mr. Herman better to understand what I explained to him originally in February 1979. I told him then, and now repeat: "When we were drafting [the Deepsea Ventures] notice of claim we were very concerned to draw the distinction between *profits à prendre* and any assertion of territorial *res corporales*—the distinction being the conveyancers' one between incorporeal and corporeal hereditaments" (6 Syracuse J. Int'l L. & Com. 187 (1978-79)).

TO THE EDITOR IN CHIEF:

September 20, 1985

Professor D'Amato misrepresents my views when he writes (79 AJIL 657, 663 (1985)) that "[g]overnmental *statements*, and not their actions (and the rules inferable from them), constitute what Dr. Akehurst calls custom." What I have always maintained is that state practice, from which customary international law is derived, consists *both* of what states do *and* of what they say.

Moreover, what states do is often ambiguous or meaningless unless one looks at the accompanying explanations which states give for their behavior. The United States intervention in Grenada, which Professor D'Amato mentions, is a good example. What the United States did on that occasion could be described in various ways—(a) the United States overthrew a left-wing government of a small state in the Caribbean; (b) the United States overthrew a government which had seized power in a bloody coup d'état; (c) the United States overthrew a government which, if it had continued in power, might have violated human rights in the future; (d) the United States overthrew a government which, if it had continued in power, might have practiced subversion against its neighbors in the future; (e) the United States restored law and order in Grenada at the request of the Governor-General of Grenada; (f) the United States intervened at the request of the Organization of Eastern Caribbean States; (g) the United States rescued some of its citizens who were alleged to be in danger. To each of these descriptions corresponds a rule or alleged rule of international law which has been "articulated" (as Professor D'Amato would say) at some time or another—spheres of influence, interventions to protect constitutional legitimacy, humanitarian intervention, anticipatory self-defense, and so on.

Are we to regard any action by a state as a precedent in favor of every alleged rule of international law which someone might regard as relevant



to any of the possible descriptions of that action? The answer must surely be no; otherwise no law-abiding state would ever dare do anything, for fear of creating a host of undesirable precedents. In order to make sense of state practice, it is necessary to select some possible descriptions of a state's actions as legally relevant, and to dismiss other possible descriptions of its actions as legally irrelevant. I would submit that the descriptions of a state's actions which are legally relevant are those which the state itself chooses to give to its actions; customary international law is created by states, not by academics, and what counts are the descriptions and justifications which a state invokes for its actions, not the descriptions and justifications which academics may invent.

To try to go behind the stated reasons for a state's actions, in search of the "real" reasons for its actions, is a hopeless quest; the internal deliberations of most governments are secret. Moreover, such a quest is as inadmissible as trying to go behind the reasons given by a judge for his judgment, in the hope of finding the "real" reasons for his judgment (bad temper, racial prejudice, etc.). A system of judicial precedent will work only if a judgment is treated as a precedent for the rules of law invoked in that judgment; in the same way, that other system of precedent which we call customary international law will work only if a state's actions are treated as a precedent for the rules of law which the state invokes as the justification for its actions. Nor does this approach condemn international law to unreality and immobility, as Professor D'Amato fears; states often invoke justifications which academic international lawyers do not expect to hear, or which are entirely new. For instance, the states which claimed exclusive rights over the continental shelf in the years following 1945 were consciously creating a new rule of customary law; they did not try (as many academic international lawyers at that time tried) to justify their actions by reference to old rules of customary law.

Similarly, when states (either individually or through United Nations resolutions) protest the illegality of another state's actions, their protests should be taken to mean what they say. To question the value of such protests by producing evidence or conjectures that the protesting states did not mean what they said is as inadmissible as questioning the validity of an Act of Congress by producing evidence or conjectures that the legislators who voted for the Act were not sincere in their support for it and that they voted for it solely in order to placate a pressure group. No system of law can work unless people are regarded as meaning what they say.

Finally, I am surprised to see that Professor D'Amato supports humanitarian intervention, because, if I have understood him correctly, he regards consensus as a separate source of international law, distinct from custom (D'Amato, *On Consensus*, 8 Can. Y.B. Int'l L. 104 (1970)); and in recent years there seems to be a consensus among states that humanitarian intervention is unlawful (see my chapter on humanitarian intervention in *Intervention in World Politics* (Hedley Bull ed. 1984), especially at pp. 97-99 and 108-09).

MICHAEL AKEHURST  
*University of Keele*

*Anthony D'Amato replies:*

Dr. Michael Akehurst has provided us with extraordinarily detailed and rich research on the sources of international law and their hierarchy, and I

am delighted that he has given us an additional contribution in the form of a letter of criticism. But I am not sure that he has clarified his own position to the point where he can claim that I, or anyone else, have misrepresented it.

While Dr. Akehurst may claim that the state practice that constitutes customary international law consists both of what states *do* and what they *say*, his previous writings, as well as the present letter, make it quite clear how unimportant he considers what states *do*. He gives seven highly varied "descriptions" of the Grenada intervention, all of them purporting to describe what the United States *did*. Indeed, such a list is not limited to seven; one could continue the process of possible descriptions indefinitely, just as the Skolem-Lowenheim theory in mathematics proved that, as to any given mathematical facts, an indefinite number of different theories can be constructed that are consistent with, and explanatory of, all the data. It thus seems to me to be a reasonable inference to draw from Dr. Akehurst's work that what states *do* does not constitute customary practice, because he relies not at all on what they do. Whatever states do—or for that matter, refrain from doing—is of next to no importance to him. What states *say* they did, in contrast, is all-important. In fact, if Dr. Akehurst wants to adopt extreme philosophic relativism, he might argue that states do not "actually do" anything until they tell us what they have done.

My position, as Dr. Akehurst recognizes, is quite the opposite. I think it is open to states to say just about anything that serves their interests. Whether or not they have a good attorney such as Dr. Akehurst on hand to advise them, they are likely to come up with self-serving formulations that render even the most blatantly illegal acts consistent with a rule of international law—simply by distorting and mis-describing what they actually did. This is the point in my editorial that Dr. Akehurst now criticizes. May I add to it the homespun example that, in domestic law, we do not wait to see how the criminal characterizes his deed before deciding whether what he did was illegal. A thief, apprehended as he exits from a bank with a sackful of swag, might explain that he was simply effectuating a Rawlsian distribution of wealth from the most advantaged sector to the least advantaged. We arrest him anyway for robbing the bank.

Given the simplicity of verbal invention, and the infinite variety of sentences that can be used to explain or mis-explain events, I find it unpersuasive to base a theory of customary law upon what states *say*. Yet I sympathize with those who, like Dr. Akehurst, search for absolutes. It would be very convenient for scholars to rely upon what nations say as a source of customary rules, just as it would be convenient to accept any General Assembly resolution as defining norms of international law. But neither of these things works because of the simple fact that nations do not always tell the truth. They will deliberately mis-characterize an illegal act as one that is consistent with international law, just as they will vote for a UN resolution for political reasons while saying privately that they disagree with it.

My own writings have attempted to show that custom is not an absolute, and that norms of international law are more or less persuasive depending upon the evidence of state practice that can be mustered in their favor. I may have been too insistent in the past that state actions are unambiguous; all I meant to say was that actions in the real world can only do one thing at one time (as contrasted with verbalizations, which can be infinitely various). In any event, I do not agree with Dr. Akehurst that any one of a long list



of descriptions of real-world events is as good as any other; that is a recipe, I think, for legal futility. Some descriptions *are* more persuasive than others—whether or not they are the ones articulated by the state-actors themselves.

Further elaboration on the interesting points raised by Dr. Akehurst is not possible in the limited space here. But I do want to respond to two other issues in his letter. First, states sometimes use protests, as they do General Assembly resolutions, to condemn things they secretly approve of, for political and public relations reasons. These international linguistic usages are not equivalent to domestic legislative processes, even though Dr. Akehurst's contrary view would have the benefit of making law-determination easier for international lawyers. Second, I have tried *not* to say that "consensus" is a "source" of rules of international law (I even think the word "source" is misleading and ambiguous). The consensus of states may be what we *mean* by "international law," but the only actual consensus I have found has been with regard to process (what Hart calls the secondary rules of law formation) and not with regard to individual rules. For instance, Dr. Akehurst thinks that there is a consensus against humanitarian intervention, whereas the majority view on this side of the Atlantic is, I think, quite the opposite. This disagreement simply shows the poverty of assertions about "consensus." But I would argue that customary law is forging precedents in favor of the legality of humanitarian intervention.<sup>1</sup>

<sup>1</sup> I am pleased to recommend a forthcoming study that reaches this conclusion by my student, Professor Fernando Tesón, who is in the process of completing his SJD dissertation on humanitarian intervention.

# CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

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The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

## DIPLOMATIC MISSIONS AND EMBASSY PROPERTY

(U.S. *Digest*, Ch. 4, §1)

### *Appointment, Accreditation, and Notification*

On September 23, 1985, the deputy spokesman of the Department of State, Charles E. Redman, announced at the daily press briefing that Ambassador-designate J. H. A. Beukes of the Republic of South Africa would present copies of his credentials to Deputy Secretary of State John C. Whitehead that afternoon. The decision to accept the ambassador's credentials at that time, the deputy spokesman said, reflected the United States Government's view "that the gravity of the domestic situation in South Africa and continuing regional violence mandate[d] that the United States utilize all possible channels of communication to convey to the South African Government the need for immediate domestic reform and progress toward regional peace."<sup>1</sup> He continued: "Our relations with South Africa remain troubled. Events in South Africa, increased violence in the region, including South Africa's military involvement in Angola and violations of Nkomati, are issues of deep concern and are at the center stage of our diplomacy with South Africa."

In response to a question from the press, whether the new ambassador had to present his credentials to President Reagan to make the acceptance process complete, the deputy spokesman stated:

[F]or all practical purposes, once he has presented his credentials to the Deputy Secretary—which is, by the way, routine for all newly ar-

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<sup>1</sup> Earlier, on Sept. 9, 1985, when signing Executive Order No. 12532, "Prohibiting Trade and Certain Other Transactions Involving South Africa," President Ronald Reagan stated that he had recalled the U.S. Ambassador to South Africa 3 months previously for consultation so that "he could participate in . . . [an] intensive review of the southern African situation" and that he was now sending the ambassador back with a message to South African President P. W. Botha "underlining our grave view of the current crisis and our assessment of what is needed to restore confidence abroad and move from confrontation to negotiation at home." 21 WEEKLY COMP. PRES. DOC. 1049 (Sept. 16, 1985); DEPT. ST. BULL., No. 2103, Oct. 1985, at 2. For a discussion of Executive Order No. 12532, see *infra* p. 153.

iving Ambassadors—he will be able then to function as the South African Ambassador. The customary meeting with the President then will follow as the President's schedule allows. . . .<sup>2</sup>

Another inquiry was directed to the delay in accepting the new ambassador's credentials, given his arrival date in early April 1985. Mr. Redman replied that it had not been considered appropriate to accept Ambassador-designate Beukes's credentials as long as the U.S. Ambassador to the Republic of South Africa, Herman W. Nickel, was in the United States for consultations as a result of certain actions by the South African Government.<sup>3</sup>

#### AIR LAW

(U.S. *Digest*, Ch. 8, §1)

##### *North Pacific Route System: Emergency Communications*

By a trilateral exchange of notes at Tokyo on October 8, 1985 among American Ambassador Mike Mansfield, Soviet Ambassador to Japan Pyotr Abrasimov and Japanese Minister of Foreign Affairs Shintaro Abe, the United States of America, the Union of Soviet Socialist Republics and Japan brought into force arrangements to enhance the safety of flights over the North Pacific Route System. These arrangements were set out in a memorandum of understanding signed by representatives of the three Governments at Tokyo on July 29, 1985. The trilateral exchange confirmed the memorandum, which provides for a new communications network among the parties' respective air control centers at Anchorage, Tokyo and Khabarovsk in order to coordinate actions to assist a civil aircraft in an emergency.

Recognizing the complete and exclusive sovereignty of each state over the airspace above its territory, the memorandum designates the area control centers (ACCS) at Anchorage, Tokyo and Khabarovsk as points of contact among the parties' respective air traffic control services, with the center at Tokyo the principal point of contact. Contact among the three air traffic control services is to be conducted on a priority basis. To achieve coordination of their actions, the area control centers at Anchorage and Tokyo will initiate communication with the Khabarovsk area control center to provide all available information regarding a civil aircraft assigned to a North Pacific route when they are aware of its possible entry into a Soviet flight information region (FIR). When necessary, the area control center at Khabarovsk will initiate communication with the Tokyo and Anchorage area control centers to exchange information about an unidentified aircraft appearing in a Soviet flight information region. To the extent available, the following will be exchanged: information provided by the appropriate area control center that the situation has occurred; data on the type of aircraft; its radio call sign, transponder code, nationality, operator, location, altitude, and speed; the time and type of the event; the pilot's intentions if known; actions taken and

<sup>2</sup> The President received Ambassador Beukes on Nov. 5, 1985.

<sup>3</sup> Dept. of State daily press briefing, DPC No. 168, Sept. 23, 1985.

assistance requested; information to the responsible search and rescue agencies. The communication facilities between the Anchorage, Tokyo and Khabarovsk area control centers are to be available on a round-the-clock basis.

A new dedicated direct speech circuit, using the currently existing telephone cable, is to be established between the Tokyo and Khabarovsk area control centers. The existing high-frequency speech circuit between the Sapporo (Japan) and Khabarovsk area control centers, connected by domestic telephone channel to the Tokyo area control center, is to be used as a backup to the direct speech circuit.<sup>1</sup>

#### ECONOMIC SANCTIONS

(U.S. *Digest*, Ch. 10, §12)

##### *South Africa*

On September 9, 1985, President Ronald Reagan signed Executive Order No. 12532, "Prohibiting Trade and Certain Other Transactions Involving South Africa,"<sup>1</sup> in which the President put in place a number of measures to dissociate the United States and its nationals from the South African Government's policy and practice of apartheid.

The preambulatory paragraph of the order lists the authorities for the President's actions: the Constitution and United States laws, including the International Emergency Economic Powers Act (50 U.S.C. §1701 *et seq.*), the National Emergencies Act (50 U.S.C. §1601 *et seq.*), the Foreign Assistance Act (22 U.S.C. §2151 *et seq.*), the United Nations Participation Act (22 U.S.C. §287), the Arms Export Control Act (22 U.S.C. §2751 *et seq.*), the Export Administration Act (50 U.S.C. App. §2401 *et seq.*), the Atomic Energy Act (42 U.S.C. §2011 *et seq.*), the Foreign Service Act (22 U.S.C. §3901 *et seq.*), the Federal Advisory Committee Act (5 U.S.C. App. I [*sic*; App. 2]) and section 301 of Title 3 U.S.C. (the general authorization for delegation of presidential functions).

The preamble also sets out the considerations that led to: (1) the President's finding that the South African Government's policies and actions (in regard to its system of apartheid) "constitute an unusual and extraordinary threat" to U.S. foreign policy and to the U.S. economy; and (2) the President's declaration of a "national emergency to deal with that threat." Referring to United Nations Security Council resolutions (No. 418, dated November

<sup>1</sup> Dept. of State Files L/T. The memorandum of understanding resulted from meetings among the parties at Washington, February 26–March 3, 1985; at Moscow, May 20–25, 1985; and at Tokyo, July 17–29, 1985. In a review of air traffic service enhancement in the Northern Pacific, it was noted that the United States had carried out plans for secondary radar on St. Paul Island, complemented by existing Japanese radar coverage of the route system. The parties agreed, also, to consider the possibility of using the radio broadcasting station in Petropavlovsk-Kamchatskiy as a nondirectional radio beacon.

<sup>1</sup> 50 Fed. Reg. 36,861 (1985).

4, 1977; No. 558, dated December 13, 1984; and No. 569, dated July 26, 1985), the preamble sets out the further consideration that

the policy and practice of apartheid are repugnant to the moral and political values of democratic and free societies and run counter to United States policies to promote democratic governments throughout the world and respect for human rights, and the policy of the United States to influence peaceful change in South Africa.<sup>2</sup>

The final consideration mentioned is that recent events in South Africa pose a threat to U.S. interests.

Section 1(a) of the order prohibits, with stated exceptions, financial institutions in the United States from making or approving loans to the South African Government or to any entities owned or controlled by it, the prohibition to enter into force on November 11, 1985 (i.e., within 60 days from the date of the order). The prohibition does not apply to any loan or extension of credit for any educational, housing or health facility available to all persons on a nondiscriminatory basis and located in a geographic area accessible to all population groups without any legal or administrative restriction, or to any loan or extension of credit agreed upon prior to the date of the order. Rules and regulations to carry out these provisions are to be issued within 60 days by the Secretary of the Treasury, who is also authorized, in consultation with the Secretary of State, to permit exceptions to the prohibition only if the Secretary of the Treasury determines that the loan or extension of credit will improve the welfare or expand the economic opportunities of persons in South Africa disadvantaged by the apartheid system. No exceptions are to be made for any apartheid-enforcing entity.

Section 1(b) prohibits all exports of computers, computer software, or goods or technology intended to service computers to or for use by South African Government entities involved in enforcing apartheid: (1) the military; (2) the police; (3) the prison system; (4) the national security agencies; (5) the Arms Corporation of South Africa (ARMSCOR) and its subsidiaries or the weapons research activities of the Council for Scientific and Industrial Research; (6) the authorities administering black passbook and similar controls; (7) any apartheid-enforcing agency; and (8) any local or regional government or "homeland" entity performing any function of any entity listed in categories (1) through (7). Rules and regulations to carry out these provisions and to implement a related system of end-use verification are to be issued by the Secretary of Commerce.

Section 1(c) prohibits licensing for export to South Africa of goods or technology to be used in a nuclear production or utilization facility, or which in the judgment of the Secretary of State are likely to be diverted for such use. Section 1(c) also prohibits any authorization to engage, directly or indirectly, in the production of special nuclear material in South Africa, any license for the export to South Africa of component parts or other items or substances having significance for nuclear explosive purposes, or any approval of retransfers to South Africa of any such goods, technology, special nuclear

<sup>2</sup> *Id.*

material, components, items or substances. The Secretaries of State, Energy, Commerce and the Treasury are authorized to take actions necessary to carry out these prohibitions. No provision of section 1(c), however, is to preclude assistance for safeguards or programs of the International Atomic Energy Agency generally available to its member states, or for technical programs to reduce proliferation risks or for exports that the Secretary of State determines to be necessary to protect the public health and safety.

Section 1(d) prohibits the import into the United States of any South African-produced arms, ammunition or military vehicles or of any manufacturing data therefor.<sup>3</sup> The Secretaries of State, Defense and the Treasury are authorized to take necessary actions to carry out this provision.

Section 2 concerns the applicability to the South African operations of United States nationals of fair labor principles (based upon those originally formulated in 1977 by Rev. Leon Sullivan and generally referred to as the "Sullivan code" or the "Sullivan principles"<sup>4</sup>), which are set out in section 2(c). Section 2(a) states that the majority of U.S. firms in South Africa have voluntarily adhered to these principles and that United States policy is to encourage all to do so.

Section 2(b) prohibits any United States department or agency from interceding, after December 31, 1985, "with any foreign government regarding the export marketing activity in any country" of any U.S. national employing more than 25 individuals in South Africa who does not adhere to the fair labor principles set out in section 2(c) with respect to that national's operations in South Africa. The Secretary of State is to promulgate regulations and procedures to ensure that such nationals may register that they have so adhered. The fair labor principles follow:

- (1) Desegregating the races in each employment facility;
- (2) Providing equal employment opportunity for all employees without regard to race or ethnic origin;
- (3) Assuring that the pay system is applied to all employees without regard to race or ethnic origin;
- (4) Establishing a minimum wage and salary structure based on the appropriate local minimum economic level which takes into account the needs of employees and their families;
- (5) Increasing by appropriate means, the number of persons in managerial, supervisory, administrative, clerical, and technical jobs who are disadvantaged by the apartheid system for the purpose of significantly increasing their representation in such jobs;
- (6) Taking reasonable steps to improve the quality of employees' lives outside the work environment with respect to housing, transportation, schooling, recreation, and health;
- (7) Implementing fair labor practices by recognizing the right of all employees, regardless of racial or other distinctions, to self-organization

<sup>3</sup> For the regulations implementing this prohibition, see revisions to 27 C.F.R., pt. 47, issued on Oct. 7, 1985 and approved on Oct. 9, 1985, *id.* at 42,157.

<sup>4</sup> See DEPT. ST. BULL., No. 2103, Oct. 1985, at 1; *U.S. Policy toward South Africa: Hearings Before the Subcomm. on Africa of the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. 416-17 (1980).

and to form, join, or assist labor organizations, freely and without penalty or reprisal, and recognizing the right to refrain from any such activity.<sup>5</sup>

Under section 2(d), U.S. nationals referred to in section 2(b) are encouraged to support the right of all businesses, regardless of the racial character of their owners or employees, to locate in urban areas and to influence other companies in South Africa to follow the fair labor principles by supporting the freedom of mobility of all workers, regardless of race, to seek employment opportunities wherever they exist and by providing for adequate housing for employees' families near the work place.

Section 3 of Executive Order No. 12532 requires the Secretary of State and the head of any other United States department or agency carrying out activities in South Africa to take the necessary steps to ensure that the labor principles listed in section 2(c) are applied to their South African employees. Section 4 requires them, in procuring goods or services in South Africa, to make affirmative efforts to assist enterprises that are more than 50 percent beneficially owned by persons in South Africa disadvantaged by the apartheid system.

Section 5 relates to gold coinage. Paragraph (a) directs the Secretary of State and the United States Trade Representative to consult with other parties to the General Agreement on Tariffs and Trade about prohibiting the import of Krugerrands. Paragraph (b) directs the Secretary of the Treasury to complete within 60 days a feasibility study on minting and issuing gold coins with a view toward seeking legislative authority to do so.

Section 7 of the order requires the Secretary of State to establish an Advisory Committee on South Africa to provide recommendations for measures encouraging peaceful change in South Africa, its initial report to be provided within 12 months.

Section 8 directs the Secretary of State, acting under the Foreign Assistance Act and related legislation, to increase amounts for the benefit of persons in South Africa as follows: (a) up to \$8 million from fiscal year 1986 funds for internal scholarships provided to South Africans disadvantaged by the apartheid system; and (b) up to \$1.5 million from fiscal year 1986 funds for the South African allocation in the "Human Rights Fund."<sup>6</sup> At

<sup>5</sup> 50 Fed. Reg. at 36,862-63.

<sup>6</sup> Section 116 of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. §2151n, provides in paragraph (e)(1) for the use of development assistance funds to carry out programs and activities that will "encourage or promote increased adherence to civil and political rights, as set forth in the Universal Declaration of Human Rights," in countries eligible for development assistance. The Department of State Authorization Act, Fiscal Years 1984 and 1985, Pub. L. No. 98-164, approved Nov. 22, 1983, 97 Stat. 1052, authorized in sec. 1002(a)(1) use of \$3 million for such purposes in each of those fiscal years. Paragraph (e)(2)(A) of sec. 116 of the Foreign Assistance Act of 1961, as amended, added by sec. 1002(e)(3) of Pub. L. No. 98-164, directed that of the amounts made available to carry out sec. 116(e), amounts of \$500,000 for fiscal year 1984 and \$1 million for fiscal year 1985 were to be used for "grants to nongovernmental organizations in South Africa promoting political, economic, social, juridical, and humanitarian efforts to foster a just society and to help victims of apartheid."

least one-third of that amount is to be used for legal assistance for South Africans. Appropriate increases in amounts for these purposes are to be considered in future fiscal years.

Section 9 of the order reads: "This order is intended to express and implement the foreign policy of the United States. It is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person."<sup>7</sup>

Following completion of consultations by the Secretary of State and the United States Trade Representative with other parties to the General Agreement on Tariffs and Trade, directed by paragraph 5(a) of Executive Order 12532, President Reagan signed Executive Order No. 12535, "Prohibition of the Importation of the South African Krugerrand,"<sup>8</sup> dated October 1, 1985, which bans importation of Krugerrands into the United States as of October 11, 1985.<sup>9</sup>

#### ENVIRONMENTAL AFFAIRS

(U.S. *Digest*, Ch. 11, §1)

##### *Protection of the Ozone Layer*

On September 4, 1985, President Ronald Reagan forwarded to the Senate for its advice and consent to ratification the Convention for the Protection

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The International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, approved Aug. 8, 1985, 99 Stat. 190, 261, provided in sec. 802(d), "Human Rights Fund for South Africa," that not less than 35% of the amount allocated for that fund under the Foreign Assistance Act of 1961, as amended, for each one of fiscal years 1986 and 1987 was to be used for

direct legal and other assistance to political detainees and prisoners and their families, including the investigation of the killing of protestors and prisoners, and for support for actions of black-led community organizations to resist, through non-violent means, the enforcement of apartheid policies such as—

- (1) removal of black populations from certain geographic areas on account of race or ethnic origin,
- (2) denationalization of blacks, including any distinctions between the South African citizenships of blacks and whites,
- (3) residence restrictions based on race or ethnic origin,
- (4) restrictions on the rights of blacks to seek employment in South Africa and live wherever they find employment in South Africa, and
- (5) restrictions which make it impossible for black employees and their families to be housed in family accommodations near their place of employment.

Executive Order No. 12532 increases the authorized amount to be used for these purposes to \$1.5 million for fiscal year 1986.

<sup>7</sup> 50 Fed. Reg. at 36,864.

<sup>8</sup> *Id.* at 40,325.

<sup>9</sup> For the implementing regulations, approved on Oct. 9, 1985, see *id.* at 41,682-84 (to be codified at 31 C.F.R., pt. 545).

The term "Krugerrands" includes all denominations and sizes, as well as those which have been modified, as by the addition of a clasp or loop, into items that can be worn as jewelry (31 C.F.R. 545.301). Reimportation into the United States of Krugerrand jewelry that was originally imported prior to Oct. 11, 1985 is not prohibited (31 C.F.R. 545.403).



of the Ozone Layer, with Annexes, which was adopted and opened for signature at Vienna on March 22, 1985 at the conclusion of the Conference of Plenipotentiaries on the Protection of the Ozone Layer, held under the auspices of the United Nations Environment Programme. The President included in his message of transmittal the Acting Secretary of State's report on the Convention, the Final Act of the Conference, and an environmental assessment and finding of no significant impact by the Department of State's Bureau of Oceans and International Environmental and Scientific Affairs, dated August 15, 1985.<sup>1</sup>

The Convention, in whose negotiation the United States played a leading role, establishes a foundation for global multilateral undertakings to protect human health and the environment from potential adverse effects caused by depletion of stratospheric ozone. While providing in the first instance for international cooperation in research and the exchange of information, the Convention can also serve as a framework for possible future protocols containing harmonized regulatory measures that might be considered necessary at that time to protect the ozone layer.

In submitting the Convention to President Reagan on August 22, 1985, Acting Secretary of State John C. Whitehead reported in part:

The Convention is an important instrument for the protection of a critical global environmental resource. The stratospheric ozone layer encircling the entire globe prevents harmful amounts of ultraviolet radiation from reaching the earth. Depletion of stratospheric ozone by atmospheric pollutants could result in significant adverse impacts on human health, including an increase in skin cancer rates and suppression of human immune responses. Environmental effects could include reduced crop yields, adverse effects on aquatic ecosystems, including fisheries, and potentially significant climatic changes.

The Convention is an important step in protecting the environment and preserving public health from the potential effects of ozone depletion. Due to the nature of the ozone layer, a multilateral undertaking such as the Convention is the only way to promote the global coordination and harmonization necessary for protection of stratospheric ozone. Early United States ratification is important to demonstrate to the rest of the world our commitment to protection and preservation of this critical resource and will encourage the wide participation necessary for full realization of the Convention's goals. Ratification of the Convention is consistent with our foreign policy and economic and environmental interests.

The Convention is the product of more than three years of negotiations under the auspices of the United Nations Environment Program (UNEP). The Department of State coordinated with all relevant federal agencies, including the Environmental Protection Agency, the National Aeronautics and Space Administration, and the National Oceanic and Atmospheric Administration, during the negotiations. Those agencies strongly support early ratification of the Convention. Close relations were also maintained with the Congress, industry, and environmental

<sup>1</sup> Dept. of State File No. P85 0168-1609.

groups throughout the negotiations. All these constituencies are believed to support ratification of the Convention.

Articles 2 through 4 are the most significant substantive provisions of the Convention. Article 2 sets out the general obligations of parties to the Convention, including a requirement to take appropriate measures for the protection of the ozone layer and the obligation to cooperate in research and information exchange. Article 3 specifies that the parties will cooperate, as appropriate, in conducting research and scientific assessments in a wide variety of areas, including chemical, biological, health, and climatic effects. Article 4 provides for the exchange of socioeconomic, commercial, and legal information. These provisions of the Convention will supplement and regularize existing informal and ad hoc information-exchange mechanisms that have been useful to the United States in the past.

Article 7 of the Convention provides for the establishment of a secretariat to facilitate the purposes of the Convention. Until the Convention enters into force, UNEP will act as temporary secretariat. Thereafter, the first meeting of the contracting parties will designate a permanent secretariat. One possibility is that the World Meteorological Organization (WMO) will be requested to serve as the permanent secretariat. The secretariat will arrange meetings of the parties to the Convention, prepare and transmit reports based on information received from the parties, and perform other coordinating functions necessary for the realization of the aims and purposes of the Convention.

Article 8 of the Convention provides for the possible adoption of future protocols. It is through such protocols that any coordinated regulatory measures which might in the future be considered necessary for the protection of the ozone layer would be implemented. The executive branch would examine the environmental impacts of such measures in connection with the negotiation and conclusion of any future protocols.

Article 11 of the Convention concerns settlement of disputes.<sup>2</sup> The general principle set out in that provision is that disagreements con-

<sup>2</sup> Article 11 provides, in effect, for tiers in the settlement of disputes. It reads:

1. In the event of a dispute between parties concerning the interpretation or application of this Convention, the parties concerned shall seek solution by negotiation.

2. If the parties concerned cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party.

3. When ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a State or regional economic integration organization may declare in writing to the Depositary that for a dispute not resolved in accordance with paragraph 1 or paragraph 2 above, it accepts one or both of the following means of dispute settlement as compulsory:

(a) Arbitration in accordance with procedures to be adopted by the Conference of the parties at its first ordinary meeting;

(b) Submission of the dispute to the International Court of Justice.

4. If the parties have not, in accordance with paragraph 3 above, accepted the same or any procedure, the dispute shall be submitted to conciliation in accordance with paragraph 5 below unless the parties otherwise agree.

cerning the interpretation of the Convention should be resolved by negotiation. Alternately, with the agreement of all parties concerned, the good offices of, or mediation by, a third party may be sought. Arbitration or reference of a dispute to the International Court of Justice are additional options that apply only to those parties that have affirmatively accepted those mechanisms with respect to the Convention or a particular protocol. The obligations in the Convention are not considered to be of such a nature that the United States should accept either of these binding means of dispute settlement with respect to the Convention at this time.

Various provisions in the Convention, including articles 12 through 15, deal with participation by regional economic integration organizations (REIOs), and in particular the European Economic Community (EEC). During the negotiations, United States delegates successfully sought to ensure that the division between the EEC and its member states of responsibility for implementing the Convention would not impair realization of the Convention's purposes. In particular, the purpose of article 15 is to guarantee that REIOs, none of whose member states are parties to the Convention or relevant protocol, have only one vote. Article 15 also prohibits double voting by REIOs, which may not vote in addition to their member states that are parties to the Convention or relevant protocol, and vice versa.

The two annexes to the Convention delineate areas of cooperative activity and procedures for the exchange of information. Annex I elaborates the major scientific issues and subjects of cooperative research outlined in article 3 of the Convention, including (1) modification of the composition of the stratospheric ozone layer, which could have harmful health and environmental effects; and (2) changes in the vertical distribution of ozone, which could have adverse climatic impacts. The annex identifies chemical substances thought to have the potential to modify the chemical and physical properties of the ozone layer. Annex II describes in greater detail the information identified for collection and exchange in articles 3 and 4.

The Convention does not commit the United States to additional regulatory undertakings. The obligations in the Convention can be satisfied without additional legislation and without additional appropriations in the near term. However, a small annual contribution will eventually be necessary, probably beginning in fiscal year 1988, for the support of the secretariat. As with the Convention, negotiation of any future protocols would be undertaken in consultation with the Congress to ensure appropriate consideration of policy and legal questions.<sup>3</sup>

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5. A conciliation commission shall be created upon the request of one of the parties to the dispute. The commission shall be composed of an equal number of members appointed by each party concerned and a chairman chosen jointly by the members appointed by each party. The commission shall render a final and recommendatory award, which the parties shall consider in good faith.

6. The provisions of this article shall apply with respect to any protocol except as otherwise provided in the protocol concerned.

S. TREATY DOC. 9, 99th Cong., 1st Sess. 31-32 (1985).

<sup>3</sup> *Id.* at v-vii. The President's letter of transmittal, without attachments, also may be found at 21 WEEKLY COMP. PRES. DOC. 1031 (Sept. 9, 1985).

(U.S. *Digest*, Ch. 11, §1)*United States-Mexico*

On July 18, 1985, the Governments of the United States and of Mexico concluded Annexes Nos. I and II to their (framework) Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area (the Border Environmental Cooperation Agreement), which President Reagan and President de la Madrid had signed at their meeting at La Paz, Baja California, Mexico on August 14, 1983.<sup>1</sup> Annexes I and II were signed at San Diego, California, on the occasion of the second annual meeting of the National Coordinators whom the parties designate under Article 8 of the 1983 Agreement to carry out the responsibility, among others, of coordinating and monitoring its implementation. On the U.S. side, coordination is entrusted to the Environmental Protection Agency, operating under the foreign policy guidance of the Department of State; on the Mexican side, the Secretariat of Urban Development and Ecology (SE-DUE), through its Subsecretariat for Ecology, is the National Coordinator.

Annex I, "Agreement of Cooperation Between the United States of America and the United Mexican States for Solution of the Border Sanitation Problem at San Diego, California-Tijuana, Baja California," is one of three interrelated instruments designed to ensure that a planned Mexican sewage treatment and disposal project for the city of Tijuana will effectively prevent discharges of untreated sanitary and industrial wastewaters across the international boundary in the Tijuana-San Diego area (where cross-border flows of raw sewage over the past several years have caused a growing public health problem, requiring the quarantine of southern California beaches for lengthy periods of time).

The two Governments agreed in Annex I to cooperate in accordance with their national legislation to anticipate and consider effects and consequences of the planned works upon environmental conditions in the Tijuana-San Diego area, and, if necessary, to agree upon measures necessary to preserve environmental conditions and ecological processes. They are to hold bilateral consultations periodically through the International Boundary and Water Commission<sup>2</sup> regarding Mexico's plans for constructing wastewater facilities in the second stage of the Integrated Project. As agreed in Minute

<sup>1</sup> Under the 1983 (framework) Agreement, which entered into force Feb. 16, 1984, each Government pledges itself to cooperate, upon the basis of equality, reciprocity and mutual benefit, to prevent, reduce and eliminate sources of pollution that affect the air, water or land of the border area. The 1983 Agreement is being implemented through a series of specialized subagreements (i.e., annexes) negotiated by United States and Mexican technical agencies. The Agreement makes specific provision for state and local governments, nongovernmental institutions and international organizations to participate directly in Agreement activities. See DEPT. ST. BULL., No. 2079, Oct. 1983, at 25.

<sup>2</sup> The International Boundary and Water Commission had its origin in the International Boundary Commission, established by a convention between the United States and Mexico that was concluded on Mar. 1, 1889. Its original purpose was to facilitate the carrying out of an earlier convention, dated Nov. 12, 1884, that had set forth rules for determining questions connected with those parts of the dividing line between the United States and Mexico lying in the middle of the channel of the Rio Grande and the Rio Colorado. The 1889 convention was

No. 270, in case of breakdown or interruption of service in the system, Mexico will take special measures for immediate repairs; if Mexico so requests through the Commission, the United States section will arrange for provision of U.S. assistance to Mexico to ensure that repairs are carried out immediately through, and under the supervision of, the Commission. The two Governments will also consult immediately on any matter brought to their attention as a result of the joint monitoring of the construction, operation and maintenance of the treatment and disposal facilities by both Commission sections, in accordance with Article 2 of the 1944 Water Treaty and Resolution No. 10 of Minute No. 270, with a view to taking timely corrective action. If sewage spills from Tijuana into the United States occur despite the best efforts of both parties, the National Coordinators will consider additional joint actions or measures that each might take in their respective territories to remedy the situation.

The second instrument, Minute No. 270 of the International Boundary and Water Commission, United States and Mexico,<sup>3</sup> was signed by Commissioners J. F. Friedkin and Joaquín Bustamante R. (Redondo) on April 30, 1985 and formally approved by the two Governments on July 16, 1985. The approved Minute provides that Mexico shall construct, operate and maintain certain sanitary wastewater treatment and disposal facilities (a detailed description of the facilities is attached to Minute No. 270) as part of the first stage of the (Mexican) Integrated Project for Potable Water and Sewerage for the City of Tijuana.<sup>4</sup> Minute No. 270 also provides that Mexico shall initiate studies for second-stage works for presentation to the Commission for approval and shall consult with the Commission in the course of the studies.

The third interrelated document is the loan agreement between the Inter-American Development Bank and the Banco Nacional de Obras & Servicios Públicos for the expansion and improvement of the potable water supply and sewerage systems of Tijuana (Document PR-1414). As a result of special

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extended several times and was extended indefinitely by Article 2 of the Treaty for the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, *signed* Feb. 3, 1944, TS No. 994, 59 Stat. 1219, with supplementary protocol signed Nov. 14, 1944 (the Water Treaty of 1944). The Water Treaty expanded the responsibility of the Commission and changed its name, in Article 2, to the International Boundary and Water Commission, United States and Mexico. Under Article 3, the two Governments agree "to give preferential attention to the solution of all border sanitation problems."

<sup>3</sup> Minute No. 270 is entitled "Recommendations for the First Stage Treatment and Disposal Facilities for the Solution of the Border Sanitation Problem at San Diego, California-Tijuana, Baja California."

<sup>4</sup> In accordance with the National Environmental Policy Act (42 U.S.C. §4321 *et seq.*), the U.S. section of the International Boundary and Water Commission prepared an environmental assessment of the proposed action covered by Minute No. 270 and made a finding of no significant impact. *See* 50 Fed. Reg. 16,569 (1985).

Because of the public significance of the San Diego-Tijuana sanitation issue, Department of State and Environmental Protection Agency officials had numerous consultations with members of the Senate and the House of Representatives, their staffs and the committees concerned on progress toward resolving the problem. Key members of Congress, as well as officials of San Diego City and County and the state of California, were also involved as observers in a number of meetings with Mexican officials over a 4-year period.

conditions and recommendations adopted in the loan agreement, the United States voted in favor of the loan, which was approved on March 6, 1985.

Annex II, "Agreement of Cooperation Between the United States of America and the United Mexican States Regarding Pollution of the Environment Along the Inland International Boundary by Discharges of Hazardous Substances," was also signed at San Diego on July 18, 1985. Article II states a commitment to establish a United States-Mexico Joint Contingency Plan to provide cooperative measures to deal effectively with polluting incidents caused by discharges of hazardous substances in the border area along the joint inland international boundary, defined in Article I(d) as the "non-maritime area . . . situated 100 km (approximately 60 miles) on either side of the inland international boundary." (The functions and responsibilities of the instrumentalities carrying out the Joint Contingency Plan are described in Appendix I, "On-Scene Coordinator," and Appendix II, "Joint Response Team," to Annex II.) Under Article III of Annex II, the parties commit themselves to develop response plans

designed to permit detection of the existence or the imminent possibility of the occurrence of polluting incidents within their respective areas [areas] and to provide adequate response measures to eliminate to the extent possible the threat posed by such incidents and to minimize any adverse effects on the environment and the public health and welfare.

Under Article IV, the coordinating authorities for the plan are, again, the United States Environmental Protection Agency and the Mexican Secretariat of Urban Development and Ecology.

Under Article VI, a joint response with respect to a polluting incident will be implemented by agreement of the parties and in accordance with the plan, and when being implemented, the measures necessary to respond to the polluting incident will also be determined by agreement of the parties and in accordance with the plan. Article VII is a savings provision with respect to existing or future agreements between the parties and with respect to international agreements to which they may be a party. It also provides that nothing in Annex II shall prejudice or otherwise affect the functions entrusted to the International Boundary and Water Commission under the 1944 Water Treaty. Article VIII envisages the addition of technical appendixes to Annex II and the amendment of existing appendixes, all of which are to constitute an integral part of Annex II.

Article XI of Annex II provides for entry into force upon an exchange of notes in which each party informs the other that it has completed its necessary internal procedures. Annex II is to remain in force indefinitely, subject to termination upon 6 months' written notification.

#### THE INTERNATIONAL COURT OF JUSTICE

(U.S. *Digest*, Ch. 13, §3)

##### *Termination of Acceptance of Compulsory Jurisdiction*

On instruction from President Ronald Reagan, Secretary of State George P. Shultz notified UN Secretary-General Javier Pérez de Cuéllar on October

7, 1985, by a letter dated October 4, 1985, that the United States Declaration of acceptance of the compulsory jurisdiction of the International Court of Justice was terminated effective 6 months from October 7, 1985.<sup>1</sup>

The U.S. Declaration, signed by President Harry S. Truman on August 14, 1946 and deposited with the Secretary-General of the United Nations on August 26, 1946, had been previously modified by a note from Secretary Shultz to the Secretary-General dated April 6, 1984.<sup>2</sup> The modification provided that, for 2 years from April 6, 1984, the Declaration of acceptance did not apply to disputes with any Central American state or arising out of or related to events in Central America, any of which were to be settled in such manner as the parties to such disputes might agree. The 1984 notification that modified (i.e., limited) U.S. submission to the Court's compulsory jurisdiction had declared that the purpose of the modification was "to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic and security problems of Central America."

The background to the United States Government's decision to terminate submission to the Court's optional compulsory jurisdiction—through termination of the 1946 U.S. Declaration of acceptance—was summarized in a Department statement presented at the daily news briefing on October 7, 1985, reading in part as follows:

This decision is fully compatible with the Statute of the ICJ, which leaves it to the discretion of each state to determine its relationship with the World Court. That Statute also explicitly refers to the right to condition acceptance of the Court's compulsory jurisdiction on the principle of reciprocity.

When President Truman signed the U.S. declaration accepting the World Court's optional compulsory jurisdiction on August 14, 1946, this country expected that other states would soon act similarly. The essential underpinning of the U.N. system, of which the World Court is a part, is the principle of universality. Unfortunately, few other states have followed our example. Fewer than one-third of the world's states have accepted the Court's compulsory jurisdiction, and the Soviet Union and its allies have never been among them. Nor, in our judgment, has Nicaragua. Of the five Permanent Members of the U.N. Security Council only the U.S. and the United Kingdom have submitted to the Court's compulsory jurisdiction.

Our experience with compulsory jurisdiction has been deeply disappointing. We have never been able to use our acceptance of compulsory jurisdiction to bring other states before the Court, but have ourselves been sued three times. In 1946 we accepted the risks of our submitting to the Court's compulsory jurisdiction because we believed that the respect owed to the Court by other states and the Court's own appreciation of the need to adhere scrupulously to its proper judicial role, would prevent the Court's process from being abused for political ends. Those assumptions have now been proved wrong. As a result, the President has concluded that continuation of our acceptance of the Court's compulsory jurisdiction would be contrary to our commitment

<sup>1</sup> Dept. of State File No. P85 0189-0461.

<sup>2</sup> See 23 ILM 670 (1984).

to the principle of the equal application of the law and would endanger our vital national interests.

On January 18 of this year we announced that the United States would no longer participate in the proceedings instituted against it by Nicaragua in the International Court of Justice. Neither the rule of law nor the search for peace in Central America would have been served by further United States participation. The objectives of the ICJ to which we subscribe—the peaceful adjudication of international disputes—were being subverted by the effort of Nicaragua and its Cuban and Soviet sponsors to use the Court as a political weapon. Indeed, the Court itself has never seen fit to accept jurisdiction over any other political conflict involving ongoing hostilities.

This action does not signify any diminution of our traditional commitment to international law and to the International Court of Justice in performing its proper functions. U.S. acceptance of the World Court's jurisdiction under Article 36(1) of its Statute remains strong. We are committed to the proposition that the jurisdiction of the Court comprises all cases which the parties refer to it and all matters that are appropriate for the Court to handle pursuant to the United Nations Charter or treaties and conventions in force. We will continue to make use of the Court to resolve disputes whenever appropriate and will encourage others to do likewise. Indeed, as we have announced today, we have reached agreement in principle with Italy to take a longstanding dispute to the Court.<sup>3</sup>

The announcement concerning the United States and Italy, also made on October 7, 1985, referred to their agreement in principle to seek to take before a special Chamber of the Court a diplomatic claim involving the Italian subsidiary of two American corporations. A statement prepared for distribution at the daily news briefing follows:

The United States and Italy have been engaged in a longstanding dispute arising from certain actions by Italian government officials against a wholly owned subsidiary of Raytheon Company and Machlett Laboratories, Inc., both U.S. corporations. The two governments have come to the conclusion that they are unable to resolve the diplomatic claim of the United States on behalf of Raytheon Company and Machlett Laboratories, Inc. through diplomatic negotiation or binding arbitration. Therefore, the United States, in conformity with the U.S.-Italian Treaty of Friendship, Commerce and Navigation of 1948, has determined to approach the International Court of Justice with a view to submitting that dispute to a special chamber as provided by the Court's statute and rules of procedure, subject to mutually satisfactory resolution of implementing arrangements. Italy concurs in the opinion that this is an appropriate course of action.<sup>4</sup>

#### RESORT TO WAR AND ARMED FORCE

(U.S. *Digest*, Ch. 14, §1)

##### *Reprisals*

Following an Israeli air attack against the headquarters of the Palestine Liberation Organization in the area of Hammam-Plage, situated in a southern

<sup>3</sup> Dept. of State daily news briefing, DPC No. 178, Oct. 7, 1985, at 1-2.

<sup>4</sup> Dept. of State File No. P85 0168-2212.



suburb of Tunis, Tunisia, on October 1, 1985, and the lodging of a complaint by Tunisia against Israel in the United Nations Security Council, the Security Council, by a vote of 14-0-1 (U.S.), adopted Resolution 573 on October 4, 1985, the operative paragraphs of which read in part:

*The Security Council,*

1. *Condemns* vigorously the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct;

2. *Demands* that Israel refrain from perpetrating such acts of aggression or from the threat to do so;

3. *Urgently requests* the States Members of the United Nations to take measures to dissuade Israel from resorting to such acts against the sovereignty and territorial integrity of all States.<sup>1</sup>

Ambassador Vernon A. Walters, U.S. Permanent Representative to the United Nations, explained the United States' abstention on the vote as follows:

The occasion for this meeting is a particularly sad one for the United States, stemming from a raid by one close friend into the territory of another. This tragic sequence of events has roots deep in what is by now an all too familiar pattern of escalating force and counter-force. We deplore such acts of violence from whatever quarter they come. We have extended to the government of Tunisia our sincere condolences over the loss of life of its citizens. Our sympathies lie with the people of Tunisia for their grievous loss, as indeed with all the innocent victims of acts of terror and the response they inevitably provoke.

Despite our deep and abiding friendship for the Tunisian government and people, my government cannot support this resolution, disproportionately placing all blame for this latest round of the rising spiral of violence in the Middle East onto only one set of shoulders, while not also holding at fault those responsible for the terrorist acts which provoked it.

We must be absolutely explicit in identifying the real threat all civilized peoples are facing. That threat is terrorism, and the failure adequately to address the subject prevents my government from supporting this resolution. In large measure because of this failure to recognize that terrorism is at the heart of much of the violence we face, we have seen a steady increase in the terrorist attacks directed against innocent people everywhere. The most recent examples are an illustration of terrorism at its most senseless and vicious: the murder of three Israelis at Larnaca and the kidnapping and murder of a Soviet diplomat in Beirut. We reject absolutely the assertion that there can be any justification for such acts which can only be categorized as the basest of crimes.

We speak of a pattern of violence, but we must be clear. It is terrorism that is the cause of this pattern, not responses to terrorist attacks. We do not yet have all the relevant facts concerning this particular response.

<sup>1</sup> UN Doc. S/RES/573 (1985).

We, however, recognize and strongly support the principle that a state subjected to continuing terrorist attacks may respond with appropriate use of force to defend against further attacks. This is an aspect of the inherent right of self-defense recognized in the United Nations Charter. We support this principle regardless of attacker and regardless of victim. It is the collective responsibility of sovereign states to see that terrorism enjoys no sanctuary, no safe haven, and that those who practice it have no immunity from the responses their acts warrant. Moreover, it is the responsibility of each state to take appropriate steps to prevent persons or groups within its sovereign territory from perpetrating such acts. In view of the number of countries in this organization that have suffered from the scourge of terrorism, we find it surprising that this Council has not forthrightly censured other acts of terrorism that have resulted in violent responses. Until the world community is prepared to resolutely face and eliminate the problem of terrorism, the pattern of violence will continue.

Looking to the future, we believe that we must not address this incident as an obstacle to peace, but rather as an impetus for the peace process and renewed efforts towards its successful completion. If this unhappy event demonstrates anything, it is that we must concentrate our efforts to bring about peace in the region and thereby obviate the need for ever again considering such incidents in the U.N. context.

The United States for its part is resolved to do everything in its power to support the peace process. President Reagan reaffirmed this objective following his September 30, 1985, meeting with King Hussein when he said, "The United States is dedicated to achieving a just and durable peace between Israel and all its Arab neighbors. We will do all that we can to maintain the momentum achieved."<sup>2</sup>

<sup>2</sup> U.S. Mission to the United Nations Press Release No. 106(85), Oct. 4, 1985.

## JUDICIAL DECISIONS

MONROE LEIGH

*Federal Arbitration Act—Convention on the Recognition and Enforcement of Foreign Arbitral Awards—arbitrability of antitrust claims arising from an international transaction*

MITSUBISHI MOTORS CORP. v. SOLER CHRYSLER-PLYMOUTH, INC. 105 S.Ct. 3346.

U.S. Supreme Court, July 2, 1985.

Petitioner, Mitsubishi Motors Corp., a Japanese automobile manufacturer, brought suit against respondent, Soler Chrysler-Plymouth, Inc., a Puerto Rican automobile dealer, seeking an order compelling arbitration of certain disputes arising out of a sales agreement between the companies. Respondent answered, asserting various counterclaims against petitioner, including antitrust claims under the Sherman Act (15 U.S.C. §§ 1-7 (1982)). The U.S. District Court for the District of Puerto Rico ordered arbitration of most of the issues between the parties pursuant to an arbitration clause contained in the sales agreement. The clause provided:

All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association.<sup>1</sup>

The district court, relying on *Scherk v. Alberto-Culver Co.*,<sup>2</sup> held that the international character of the transaction required enforcement of the arbitration agreement even as to the antitrust claims. On appeal, the U.S. Court of Appeals for the First Circuit affirmed in part, but found that respondent's antitrust claims were not appropriate for arbitration.<sup>3</sup> The court of appeals embraced the doctrine enunciated in *American Safety Equipment Corp. v. J. P. McGuire & Co.*,<sup>4</sup> precluding "domestic" arbitration of antitrust claims, and found that neither the *Scherk* decision nor the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>5</sup> (the Convention) altered the operation of that doctrine in connection with international transactions. The Supreme Court granted certiorari on the issue of whether a U.S. court should enforce an arbitration agreement with respect to antitrust claims arising from an international commercial transaction, and held (per Blackmun, J.): that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the

<sup>1</sup> 105 S.Ct. 3346, 3349.

<sup>2</sup> 417 U.S. 506 (1974).

<sup>3</sup> 723 F.2d 155 (1st Cir. 1983), *aff'd in part and rev'd in part*, 105 S.Ct. 3346 (1985).

<sup>4</sup> 391 F.2d 821 (2d Cir. 1968).

<sup>5</sup> June 10, 1958, 21 UST 2517, TIAS No. 6997, 330 UNTS 3.

resolution of disputes require [enforcement of] the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context."<sup>6</sup>

The Supreme Court initially considered whether the arbitration clause contained in the sales agreement had to refer specifically to the Sherman Act in order to render antitrust claims arbitrable. Since the language of the Federal Arbitration Act of 1925 (9 U.S.C. §§1-14, 201, 208 (1982)) did not imply a presumption against the arbitrability of statutory claims, the Court found that congressional policy required liberal construction of the scope of arbitration agreements. Had Congress intended the substantive protection of the Sherman Act to be available exclusively through judicial recourse, the Court reasoned, that intention would have been expressed in the Act or its legislative history. No such intent was evident.

The Court then considered whether the arbitration agreement itself or any other legal constraints precluded arbitration of the antitrust claims. With little discussion, the Court agreed with the lower courts' conclusions that the arbitration provision was valid and encompassed respondent's antitrust claims. The Court noted, however, an apparent diversity of opinion with regard to the general policy regarding arbitration of antitrust claims. On the one hand, cases such as *The Bremen v. Zapata Off-Shore Co.*<sup>7</sup> and *Scherk* suggested that the need for orderliness and predictability in international transactions requires enforcement of an international arbitration agreement, even if the issues covered by the agreement would not be arbitrable in a purely domestic transaction. According to the Court, *Bremen* and *Scherk* "establish[ed] a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions."<sup>8</sup>

On the other hand, the federal courts have established a strong policy against the arbitrability of antitrust claims. According to the teaching of *American Safety*, four factors favor judicial resolution of antitrust claims: (1) the enforcement role of private party treble damage actions, (2) the possibility that an arbitration clause was the result of a contract of adhesion, (3) the sophisticated legal and economic analysis required for the resolution of antitrust claims, and (4) the disinclination of an arbitral panel composed of businessmen to enforce the antitrust laws. The Court found these factors unpersuasive in an international context. For example, the Court rejected the second factor, noting that "[t]he mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted."<sup>9</sup> Likewise, the Court rejected the fourth factor's proposition that commercial arbitration panels would be innately hostile to antitrust concepts.

<sup>6</sup> 105 S.Ct. at 3355.

<sup>7</sup> 407 U.S. 1 (1972).

<sup>8</sup> 105 S.Ct. at 3356. The Court noted that this presumption is reinforced in the area of international commerce by the emphatic federal policy favoring arbitral dispute resolution as evidenced by the U.S. accession to the Convention, and its implementation through amendment of the Federal Arbitration Act. See Act of July 31, 1970, Pub. L. No. 91-368, 84 Stat. 692 (codified at 9 U.S.C. §§201-208 (1982)).

<sup>9</sup> 105 S.Ct. at 3357.

Moreover, the Court saw no reason why treble damages could not be sought in an international arbitration, and no reason to presume this remedy would not be respected. Indeed, the Court observed that an arbitral panel would be bound to apply American antitrust laws when it is the parties' intention that claims arising thereunder be arbitrated. Therefore, the Court found that considerations of international comity, the policies underlying adherence to a freely negotiated choice of forum and the strong federal policy favoring international arbitration required enforcement of the arbitration clause even with respect to the antitrust claims.

In dissent, Justice Stevens questioned not only the arbitrability of antitrust claims, but also the scope of the arbitration clause at issue. Construing the arbitration clause more narrowly than the majority, Justice Stevens concluded that on its face it did not encompass antitrust claims. In his opinion, an arbitration clause should not be construed to cover any statutory claim unless expressly provided. Finally, Justice Stevens did not believe Congress intended the Federal Arbitration Act to apply to antitrust claims or that the Convention was intended to apply to disputes not covered by the Act.

As the dissent underscores, the Court's decision marks a liberal application of the Federal Arbitration Act and reflects an increasingly laissez-faire attitude toward international contractual arrangements. The Court itself acknowledged its acceptance of a dichotomy between domestic notions of arbitrability, which are of a more limited scope, and international norms where federal policy favors broad arbitral authority.

*Foreign Sovereign Immunities Act—act of state doctrine—commercial activities exception—situs of debt*

CALLEJO V. BANCOMER, S.A. 764 F.2d 1101.  
U.S. Court of Appeals, 5th Cir., July 8, 1985.

Plaintiffs William and Adelfa Callejo, U.S. citizens, filed suit in federal district court for breach of contract, alleging that defendant Bancomer, S.A., a Mexican bank, had refused to redeem certificates of deposit (CDs) in U.S. dollars. The district court dismissed the action, finding that the Mexican bank was an instrumentality of the Mexican Government and was therefore immune from suit under the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§1330, 1602-1611 (1982)) (FSIA). The U.S. Court of Appeals for the Fifth Circuit (per Goldberg, J.) affirmed on other grounds and *held*: that the act of state doctrine barred judicial resolution of the dispute since it would necessitate an inquiry into the validity of a sovereign act performed wholly within the foreign government's territory.

In May and June 1982, plaintiffs purchased CDs from one of defendant's branches located in Mexico. At that time, defendant was a privately owned bank. Each CD was denominated in U.S. dollars and called for payment of principal and interest in U.S. dollars. In August 1982, the Mexican Government promulgated exchange control regulations. These regulations required Mexican banks to satisfy any principal and interest obligations on

U.S.-dollar-denominated CDs by paying pesos rather than dollars. The regulations also specified a rate of exchange for such payments substantially below the prevailing market rate. The following month, the Mexican Government nationalized all privately owned banks, including defendant. Upon learning of defendant's intention to adhere to the governmental regulations, plaintiffs filed this action seeking either rescission of the CD sale or money damages.

At the outset, the court of appeals found that plaintiffs' claims fell within the FSIA's commercial activity exception, since the suit resulted directly from a breach of contract (e.g., failure to pay on the CDs as agreed) and not from the governmental regulations. Moreover, the breach had a direct, foreseeable and substantial effect in the United States. Given these considerations, the court concluded that jurisdiction existed and that the interest of the United States in protecting its citizens outweighed Mexico's potential interest in what was a purely commercial transaction.

Nevertheless, the court held that the act of state doctrine barred adjudication. Relying on *Banco Nacional de Cuba v. Sabbatino*,<sup>1</sup> the court of appeals stated that judicial resolution of the dispute was inappropriate, since it would require a judgment as to the validity of a sovereign government's public acts performed within its own territory. According to the court, this was true even where the defendant was a private party and the suit involved a commercial activity. The court refused to apply a "commercial activity" exception to the doctrine, as suggested by the plurality opinion in *Alfred Dunhill of London, Inc. v. Republic of Cuba*,<sup>2</sup> since the defendant could honor its commercial commitments only by violating the Mexican Government's regulations. According to the court, there was "no doubt" that such an action, if compelled by a U.S. court, would "vex the peace of nations."<sup>3</sup>

The court also rejected plaintiffs' assertion that the situs of the CDs was Texas, thereby requiring application of Texas state law and precluding application of the act of state doctrine. The court observed that federal law must be the basis for determining the situs of a debt incurred by a foreign bank; and the key question was whether "the ties of the debt to the foreign country [are] sufficiently close that we will antagonize the foreign government by not recognizing its acts."<sup>4</sup> since the CDs were issued in Mexico and called for payment in Mexico, the court found that the situs of the debts was Mexico.

<sup>1</sup> 376 U.S. 398, 428 (1964).

<sup>2</sup> 425 U.S. 682, 695 (1976).

<sup>3</sup> 764 F.2d 1101, 1116. The court also rejected plaintiffs' claim that Mexico had violated the exchange control regulations of the International Monetary Fund, Dec. 17, 1945, 60 Stat. 1401, TIAS No. 1501, Art. VIII(2)(a), *as amended*, Apr. 30, 1976, 29 UST 2203, TIAS No. 8937 (IMF Agreement), thereby bringing their claim within a so-called treaty exception to the act of state doctrine. Article VIII(2)(a) forbids members of the IMF from imposing exchange control regulations on "current"—as opposed to "capital"—international transactions without prior IMF approval. The court, treating this argument as one of first impression, refused to interpret the IMF Agreement or find a violation, noting that the IMF Legal Department had notified defendant's counsel that the Mexican regulations did not violate the IMF Agreement.

<sup>4</sup> 764 F.2d at 1124.

*Callejo* extends the line of U.S. cases holding that the actions of Mexican banks in the wake of the Mexican Government's exchange control regulations are not reviewable by U.S. courts.<sup>5</sup> Additionally, the Fifth Circuit joins the Second Circuit in holding that the act of state doctrine, not the FSIA, precludes adjudication of these cases. The majority of cases indicates the natural reluctance of U.S. courts to resolve disputes that reach to the heart of sovereign prerogative, including exchange controls designed to cope with international debt problems.

*Trading with the Enemy Act—Cuban Assets Control Regulations—presidential authority over foreign affairs—Fifth Amendment due process clause*

MIRANDA v. SECRETARY OF THE TREASURY. 766 F.2d 1.  
U.S. Court of Appeals, 1st Cir., June 24, 1985.

Appellant, a U.S. citizen, sought review of an order upholding the Secretary of the Treasury's denial of his application for a license to release funds frozen pursuant to the Trading with the Enemy Act (50 U.S.C. app. §§1-6, 7-39, 41-44 (1982)) and the Cuban Assets Control Regulations (31 C.F.R., pt. 515 (1985)). The U.S. Court of Appeals for the First Circuit (per Re, J.) affirmed and *held*: (1) that the Secretary's denial of appellant's application was a lawful and proper exercise of executive branch authority over foreign affairs, and (2) that the denial did not deprive appellant of property in violation of the due process clause of the Fifth Amendment.

In 1956, appellant's great aunt, a citizen of Cuba, deposited funds in a New York bank account. In 1963, the United States froze the account pursuant to the Cuban Assets Control Regulations promulgated under the Trading with the Enemy Act.<sup>1</sup> Through a series of inter vivos assignments from Cuban relatives, appellant acquired title to the frozen funds in October 1982. Appellant then filed an application with the Department of the Treasury, Office of Foreign Assets Control, for a license to unblock the account. The Secretary denied appellant's application, and the federal district court upheld the Secretary's denial.

On appeal, appellant claimed that continued blocking of the account did not advance the congressional intent underlying the Trading with the Enemy Act and Cuban Assets Control Regulations. Appellant also argued that denial of the application deprived him of property in violation of the due process clause of the Fifth Amendment.

<sup>5</sup> See, e.g., *Braka v. Nacional Financiera*, No. 83-4161 (S.D.N.Y. July 9, 1984) (case dismissed on sovereign immunity grounds); *Frankel v. Banco Nacional de Mexico*, No. 82-6457 (S.D.N.Y. May 31, 1983) (sovereign immunity dismissal); *Braka v. Bancomer, S.A.*, 589 F.Supp. 1465 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 222 (2d Cir. 1985), *summarized in* 79 AJIL 1054 (1985) (act of state dismissal); *Braka v. Multibanco Comermex*, 589 F.Supp. 802 (S.D.N.Y. 1984) (act of state dismissal).

<sup>1</sup> Pursuant to 31 C.F.R. §515.201 of the Cuban Assets Control Regulations, access to funds that were subject to U.S. jurisdiction and owned by nationals of Cuba was blocked on July 8, 1963.

The court of appeals rejected both arguments. The court first noted that pursuant to the Trading with the Enemy Act, Congress vested the President with broad authority to impose economic sanctions against an unfriendly nation. According to the court, when the President acts in the field of foreign affairs pursuant to his implied constitutional powers *and* an express congressional authorization, the President "commands all the political authority of the United States."<sup>2</sup> In such circumstances, the activities of the executive branch are " 'largely immune from judicial inquiry or interference.' "<sup>3</sup>

The court then examined the regulations on the basis of which the appellant's application had been denied. According to the court, the Cuban Assets Control Regulations advanced the legislative purpose and intent of the Trading with the Enemy Act by: (1) depriving Cuba and its nationals of funds that might be used to promote interests inimical to the United States; (2) maintaining funds for use in the settlement of claims of U.S. citizens against Cuba; and (3) retaining funds as leverage in negotiations with the Cuban Government. The Secretary's action denying appellant's application for a license furthered these legislative purposes. The fact that appellant, a U.S. citizen, had title to the assets was of little importance, since title had been obtained through a series of inter vivos transfers. The court observed that through such transfers Cuban nationals could thwart the Cuban Assets Control Regulations by assigning their assets either voluntarily or under government compulsion in exchange for like compensation or benefit. In this regard, the court distinguished cases in which U.S. citizens obtained possession of blocked funds as heirs of Cuban citizens who died without wills.<sup>4</sup> In those instances, the U.S. applicant for a license to unblock assets did not obtain title through an affirmative act by a Cuban national. Therefore, the risk of deliberate action to circumvent the regulations did not exist.

The court also found no constitutional infirmity in the continued blocking of the funds. According to the court, the original assignment from appellant's great aunt was not valid because the account was frozen at the time of the assignment. Even if appellant properly possessed the blocked funds, the Secretary's denial merely prevented appellant from enjoying the funds; it did not preclude or divest his title to the funds. In view of the significant legislative purpose and extensive presidential authority in this area, the court refused to find a Fifth Amendment due process violation.

The judgment in this case reflects the court's reluctance to create a potential loophole in the President's ability to control assets of foreign nationals under emergency declarations. It is of some note that Judge Re served as Chairman of the Foreign Claims Settlement Commission of the United States

<sup>2</sup> 766 F.2d 1, 3 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

<sup>3</sup> 766 F.2d at 4 (quoting *Regan v. Wald*, 104 S.Ct. 3026, 3039 (1984), quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)).

<sup>4</sup> See, e.g., *Real v. Simon*, 510 F.2d 557 (5th Cir.), *reh'g denied*, 514 F.2d 738 (5th Cir. 1975), summarized in 70 AJIL 357 (1976), and 71 AJIL 154 (1977); *Tagle v. Regan*, 643 F.2d 1058 (5th Cir. 1981).



and was therefore familiar with the problems inherent in the administration and implementation of intergovernmental claims settlements.<sup>5</sup>

*Countervailing duties—government-owned corporation—equity investments and funds to rationalize production are illegal subsidies*

BRITISH STEEL CORP. v. UNITED STATES. 605 F.Supp. 286.  
U.S. Court of International Trade, March 8, 1985.

Plaintiff, British Steel Corp. (BSC), brought suit to challenge a final affirmative countervailing duty determination of the U.S. Department of Commerce, International Trade Administration (ITA), concerning certain types of funds provided to plaintiff by the Government of the United Kingdom. The ITA had determined that equity infusions from the UK Government to plaintiff constituted subsidies to plaintiff's production of stainless steel plate, and had ordered countervailing duties under section 516A of the Tariff Act of 1930, as amended (19 U.S.C. §1516a (1982)). The U.S. Court of International Trade (per Newman, Sr. Judge) affirmed the ITA's determination and *held*: that funds provided by the UK Government to plaintiff as equity investments and funds provided to assist plaintiff in its effort to reduce excess steel-making capacity and rationalize production were countervailable domestic subsidies.<sup>1</sup>

Plaintiff is a corporation wholly owned by the UK Government and is the largest steel-making company in the United Kingdom. Throughout the 1970s, the UK Government made cash infusions into the company for the purchase of capital assets and for daily operations. In addition, the UK Government forgave outstanding debts of the company, incurred for the purpose of capital investment and operation. With the worldwide downturn in the steel market, plaintiff suffered continuing losses, and the UK Government maintained its investments in the company. Subsequently, the UK Government provided funds, known as redundancy and closure funds, in an effort to reduce excess capacity, rationalize production to prevailing market demands and reallocate workers.

After a petition was filed with the ITA by certain members of the U.S. steel industry, a countervailing duty investigation began into various steel products imported into the United States from a number of European countries, including the United Kingdom. Ultimately, the ITA determined that the UK Government had illegally subsidized plaintiff through its equity investments, loan forgiveness and payments to rationalize production. The ITA imposed countervailing duties to offset the price advantages from these subsidies, and plaintiff sued to obtain review.

<sup>5</sup> See *Re, The Foreign Claims Settlement Commission and the Cuban Claims Program*, 1 INT'L LAW. 81 (1966).

<sup>1</sup> The court also remanded the case to the ITA for revaluation and recalculation of the subsidies in accordance with a revised methodology promulgated by the ITA during the pendency of the case.

The central issue in the case was whether general equity funding provided to plaintiff by the UK Government, including grants and debt forgiveness, was made "on terms inconsistent with commercial considerations" and therefore constituted countervailable subsidies under section 771(5) of the Tariff Act of 1930, as amended (19 U.S.C. §1677(5)). The court observed that the test for whether an equity investment is consistent with "commercial considerations" is whether, at the time the investment is made, the recipient is required—and can be expected—to produce a reasonable rate of return on the invested capital within a reasonable period of time.<sup>2</sup> The court noted that plaintiff's financial reports for the fiscal years 1974–1975 through 1981–1982 "paint a bleak picture of a company burdened, in the face of a severe economic recession," with redundant and obsolete plants, equipment and work force, and with poor industrial relations.<sup>3</sup> The court agreed with the ITA's conclusion that given this financial background, the UK Government's investment in plaintiff was not commercially reasonable at the time it was made, and thus constituted a subsidy to the extent that the investment yielded a rate of return lower than the average rate of return on equity for the country as a whole. "Clearly, given BSC's deteriorating financial condition and precarious situation, no private sector investor expecting a reasonable return on his investment within a reasonable time would have given any consideration whatever to investing in BSC during the period of its restructuring."<sup>4</sup> The court agreed with the ITA's conclusion that the UK Government's investment was based not on the expectation of a reasonable return but on a desire to shore up the nationalized steel industry for reasons of domestic economic policy.

In so holding, the court rejected several of plaintiff's arguments. Plaintiff had contended that countervailing duties are inappropriate for funds designed to eliminate excess capacity, since such restructuring actually alleviates trade distortions caused by excess capacity—distortions that the trade laws are designed to remedy. The court, however, agreed with the ITA's conclusion that even if the restructuring of subsidies diminishes trade distortions, countervailing duties must be imposed once the determination is made that equity was provided in a manner inconsistent with commercial considerations. The court observed that "[w]hile government investment in its state-owned enterprises may indeed be rational in terms of national policy, such investment may not be consistent with commercial considerations, depending upon the soundness and terms of the investment."<sup>5</sup>

The court also rejected plaintiff's argument that funds provided specifically for the purposes of closing inefficient plants and discharging "redundant" employees are not countervailable because they do not benefit, either directly or indirectly, "manufacture, production or export" as required by

<sup>2</sup> 605 F.Supp. 286, 292 (citing SUBCOMM. ON TRADE OF THE HOUSE COMM. ON WAYS AND MEANS, 96TH CONG., 1ST SESS., SUMMARY OF RECOMMENDATIONS FOR LEGISLATION IMPLEMENTING THE MULTILATERAL TRADE NEGOTIATIONS 4 (Comm. Print 1979)).

<sup>3</sup> 605 F.Supp. at 290.

<sup>4</sup> *Id.* at 293.

<sup>5</sup> *Id.*

19 U.S.C. §§1671(a)(1) and 1677(5)(B). The court agreed with the ITA that “ ‘redundancy funds and plant closures make the recipient *more efficient and relieve it of significant financial burdens*. Thus, such funds are unquestionably *indirect*, if not direct, benefits to BSC’s manufacture, production or export of steel and consequently are countervailable.’ ”<sup>6</sup> The court concluded that the UK Government’s purposes in providing equity to plaintiff were irrelevant, and focused instead on the narrower issue of whether the funds gave the country’s exports an unfair competitive advantage by reducing the subsidized industry’s costs.

Finally, the court rejected plaintiff’s contention that general equity investments that do not relate directly to product competitiveness, and do not benefit the particular class of products at issue, are not countervailable. General, indirect financial benefits to the production process are enough, the court held; and funding that is not tied to specific lines of production, but is rather treated by the recipient as “fungible,” is countervailable on a *pro rata* basis to the production of the product at issue.

The court’s decision provides a somewhat cursory treatment of complex issues of economics and statutory interpretation. While it may well be correct to conclude that an equity investment, earmarked for “restructuring,” can be a countervailable subsidy if inconsistent with commercial considerations, this observation fails to address a more central question: whether an equity investment—particularly one specifically designed to eliminate excess capacity—is necessarily commercially unsound because the recipient is sustaining losses and is likely to continue to do so in the immediate future. Arguably, a rational investor would pay to reduce capacity only if the corporation were sustaining losses and faced a future of poor performance; otherwise, there would be no need for such investments. A government, no less than a private investor, could reasonably be expected to inject additional equity into a firm faced with excess capacity, provided that there were sound reasons to believe that the resulting efficiency gains would protect the investor’s existing stake in the firm and provide a better chance of a return in the long term.

The court’s approach reflects a well-founded concern with the uncertainty of any analysis of investor purposes; however, it may be necessary to find an objective way to give weight to the purpose for which funding is provided so as to avoid penalizing an industry for undertaking restructuring that is commercially prudent. Moreover, important legal and policy distinctions can be drawn between investments that reduce redundant factors of production and thereby facilitate adjustment to market conditions, and subsidies that are directed toward expanding capacity to levels that are inconsistent with the market. The asserted benefit of such investments—the elimination, rather than creation, of “trade distortion”—is too easily rejected by the court.

<sup>6</sup> *Id.* (quoting Final Affirmative Countervailing Duty Determinations on Stainless Steel Sheet, Strip, and Plate from the United Kingdom, 48 Fed. Reg. 19,048, 19,052–53 (1983) (emphasis added by court)).

*Sovereign immunity—alien tort claims—diplomatic immunity—violations of the law of nations*

VON DARDEL v. UNION OF SOVIET SOCIALIST REPUBLICS. No. 84-0353.  
U.S. District Court, D.D.C., October 15, 1985.

Plaintiffs, Swedish citizens, sought declaratory and injunctive relief and damages against the defendant, the USSR, for the unlawful seizure, imprisonment and possible death of Raoul Wallenberg, a Swedish diplomat. Plaintiffs alleged that in 1945 officials of the USSR arrested Wallenberg in Hungary and that he subsequently suffered imprisonment and possibly death. In a diplomatic note delivered to the U.S. Embassy in Moscow, the defendant asserted absolute sovereign immunity but did not respond to the complaint. The U.S. District Court for the District of Columbia (per Parker, J.) entered a default judgment and *held*: that jurisdiction was proper under the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§1330, 1602-1611 (1982)) (FSIA) and the Alien Tort Claims Act (28 U.S.C. §1350 (1982)) and that defendant had violated international law, U.S. law and Soviet law.

During World War II, the U.S. Government assisted in funding Wallenberg's efforts in Hungary to save Jews from Nazi extermination. In that effort, Wallenberg served as Secretary of the Swedish Legation and enjoyed full diplomatic immunity. After the Soviet occupation of Hungary in 1945, Soviet authorities arrested Wallenberg. In response to subsequent diplomatic inquiries, the Soviet Union admitted in a diplomatic note in 1957 that Wallenberg had been a prisoner in the USSR but claimed that he had died of natural causes in 1947. The Soviets described the detention of Wallenberg as "criminal activity" for which the responsible Soviet official had been shot. Plaintiffs, a relative and a legal guardian of Wallenberg, brought suit in 1984 claiming that credible reports indicated that the Soviet diplomatic note was inaccurate and that Wallenberg was alive and in prison as late as 1981. Based on the evidence presented, the court found that "defendant's representations [regarding Wallenberg's death in 1947] are suspect and should be given little, if any, credit."<sup>1</sup> Although the court had insufficient evidence to determine whether Wallenberg was dead or alive, it rejected defendant's assertion that Wallenberg had died in 1947.

The court then considered whether jurisdiction was proper under the FSIA and the Alien Tort Claims Act. As to the former, the court concluded that four theories supported jurisdiction under the FSIA. First, by virtue of its default, the defendant had failed to raise the affirmative defense of sovereign immunity. In this respect, the court observed that since the passage of the FSIA, the use of a diplomatic note to assert immunity has been precluded. Second, the court found that the FSIA incorporated preexisting standards of international law whereby a foreign government "is not immune for certain acts in clear violation of the universally accepted law of nations."<sup>2</sup> As to this, the court noted that the unauthorized imprisonment of a diplomat was a violation of international law. Third, the court stated that a foreign

<sup>1</sup> No. 84-0353, slip op. at 6.

<sup>2</sup> *Id.* at 10-11.

government defendant cannot claim immunity for acts that violate treaty obligations with the United States. The court found that the alleged imprisonment and death of Wallenberg were violations of Soviet obligations under the Vienna Convention on Diplomatic Relations<sup>3</sup> and the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents.<sup>4</sup> Finally, the court concluded that defendant had implicitly waived immunity to this action by subscribing to treaties, including the United Nations Charter, codifying principles of diplomatic immunity and human rights.

With respect to jurisdiction under the Alien Tort Claims Act, the court relied heavily upon the decision in *Tel-Oren v. Libyan Arab Republic*<sup>5</sup> and concluded that jurisdiction was proper under any of the three theories of the Act enunciated therein. First, the court observed that in *Tel-Oren* Judge Edwards concluded that jurisdiction is proper where a plaintiff alleges a tortious violation "of a principle of international law on which the community of nations has reached a consensus."<sup>6</sup> Under this analysis, since the plaintiff in the instant case alleged an action that clearly violated the law of nations (the unlawful imprisonment of a foreign diplomat), jurisdiction was proper. Second, the court relied on the more restricted view of Alien Tort Claims Act jurisdiction enunciated in *Tel-Oren* by Judge Bork. According to Judge Bork, a plaintiff must demonstrate a violation of the law of nations and a right to sue under federal or international law. Since Congress had intended that the Alien Tort Claims Act provide a cause of action for "[i]nfringement of the rights of [a]mbassadors,"<sup>7</sup> defendant's actions against Wallenberg, then Secretary to the Swedish Legation, were actionable. Finally, the court applied Judge Robb's analysis in *Tel-Oren*. Although Judge Robb invoked the political question doctrine in *Tel-Oren*, the court in this case, relying on Justice White's dissent in *Banco Nacional de Cuba v. Sabbatino*,<sup>8</sup> found that this doctrine is not controlling where the rule of decision is adequately defined. According to the court, international legal standards regarding the treatment of diplomats have long been clearly established; "their application should therefore pose little risk of embarrassing the political branches."<sup>9</sup> Thus, the political question doctrine did not apply.

Turning to the merits, the court found that the record clearly demonstrated that defendant's conduct violated international law, U.S. law and Soviet law. The court observed that the international protection of diplomats is a firmly established principle of treaty and customary international law. Moreover, U.S. law "has long accepted international standards of diplomatic immunity as part of its common law and has recognized a private civil cause

<sup>3</sup> Apr. 18, 1961, 23 UST 3227, TIAS No. 7502, 500 UNTS 95.

<sup>4</sup> Dec. 14, 1973, 28 UST 1975, TIAS No. 8532.

<sup>5</sup> 726 F.2d 774 (D.C. Cir. 1984), summarized in 78 AJIL 668 (1984), cert. denied, 105 S.Ct. 1354 (1985).

<sup>6</sup> Slip op. at 25.

<sup>7</sup> 726 F.2d at 813 (quoting 4 W. BLACKSTONE, COMMENTARIES 68, 72).

<sup>8</sup> 376 U.S. 398, 460 (1964).

<sup>9</sup> Slip op. at 29.

of action for a violation of diplomatic immunity."<sup>10</sup> As additional support for this proposition, the court observed that a private cause of action is available under the Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons (18 U.S.C. §§1201, 1116 (1982)). Finally, the court concluded that defendant's actions were unlawful under Soviet law since "Wallenberg's arrest and detention were and continue to be illegal under principles of international law and international agreements which were in force in 1945 and to which the USSR was a party."<sup>11</sup>

As the court noted, this case presented numerous unprecedented issues for decision. Whatever the merits of the litigation, the FSIA jurisdictional issues are both novel and complex. It remains to be seen whether the Soviet Union will seek relief from this decision by appeal to a higher court.

*Age Discrimination in Employment Act—extraterritorial application—U.S. citizen employed abroad*

DE YOREO V. BELL HELICOPTER TEXTRON, INC. 608 F.Supp. 377.  
U.S. District Court, N.D. Tex., April 29, 1985.

Plaintiff, S. F. De Yoreo, an American citizen, brought suit in federal district court under the Age Discrimination in Employment Act (29 U.S.C. §§621-634 (1982)) (ADEA) alleging that defendant, Bell Helicopter Textron, Inc., an American company, had illegally terminated his employment. At the time of his termination, plaintiff was employed in Canada by defendant. The U.S. District Court for the Northern District of Texas (per Belew, J.) granted defendant's motion to dismiss and *held*: that the ADEA does not apply extraterritorially so as to protect American citizens working abroad for American companies.

Plaintiff had been employed by defendant since 1952. In 1976, after working at various locations in the United States, plaintiff was transferred to an office located in Ottawa, Ontario. Six years later, defendant notified plaintiff, who was then 62 years old, that it was closing the Ottawa office and that plaintiff's employment would be terminated. Defendant denied plaintiff's request for a transfer and terminated his employment in January 1983. Several months later, defendant transferred a 42-year-old employee to Ottawa to occupy the position formerly held by plaintiff. Plaintiff filed suit, claiming that defendant had violated the ADEA's prohibition against age discrimination. He argued that the ADEA applied even though he was employed in Canada because both he and his employer were Americans; in addition, the discriminatory decision to terminate his employment had been made in the United States.

The court ruled against plaintiff, finding that the ADEA did not apply to instances of alleged age discrimination that occur abroad. Relying principally upon *Cleary v. United States Lines*,<sup>1</sup> the court observed that the general rule provides that a U.S. statute should be applied extraterritorially only where

<sup>10</sup> *Id.* at 36.

<sup>11</sup> *Id.* at 39.

<sup>1</sup> 555 F.Supp. 1251 (D.N.J. 1983), *aff'd*, 728 F.2d 607 (3d Cir. 1984).

the statute clearly so provides.<sup>2</sup> Examining the language of the ADEA, the court found no explicit provision authorizing extraterritorial application.<sup>3</sup> On the contrary, the court believed that the statutory language evidenced Congress's intent to preclude application outside the United States. This conclusion was based on the court's interpretation of the relationship of the Fair Labor Standards Act (29 U.S.C. §§201-217 (1982)) (FLSA) to the ADEA. Section 13(f) of the FLSA provides: "The provisions of sections 206, 207, 211, and 212 of this title shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country. . . ."<sup>4</sup> The court therefore concluded that Congress did not intend the ADEA to be applied extraterritorially. Moreover, the court adopted the reasoning of *Cleary* that the Act would be difficult to administer overseas, since the agency charged with administering it, the EEOC, has no offices abroad.

The court also rejected plaintiff's argument that the ADEA applied because the decision to fire him had been made in one of defendant's U.S. offices. The court concluded that the location of the discriminatory decision was irrelevant. Since plaintiff was physically located in Canada, he was beyond the territorial reach of the ADEA and thus was without rights and without standing to sue under the Act. Although acknowledging the potential for mischief by allowing a company to escape the ADEA simply by transferring an employee to a non-U.S. office and then terminating his employment, the court concluded that "[o]ur response to this problem is that Congress chose not to provide for extraterritorial application of the ADEA."<sup>5</sup>

The court's ruling that domestic statutes should ordinarily not be given extraterritorial application is beyond dispute.<sup>6</sup> However, the court's conclusion that section 13(f) of the FLSA is clear evidence of a congressional intent to limit the ADEA is arguably flawed. As plaintiff pointed out, the earlier cases upon which the court based its opinion had mis-cited the language of section 13(f).<sup>7</sup> The restriction on extraterritorial application in that section is limited to "sections 206, 207, 211, and 212 of this title."<sup>8</sup> The four listed

<sup>2</sup> See *Blackmer v. United States*, 284 U.S. 421, 437 (1932).

<sup>3</sup> The court contrasted the ADEA with the language of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2 (1982), as well as other laws, where Congress had specifically provided for extraterritorial application.

<sup>4</sup> 29 U.S.C. §213(f) (1982). Section 13(f), in turn, is referenced in §16(d) of the FLSA, which states: "[N]o employer shall be subject to any liability or punishment under this . . . Act . . . on account of his failure to comply with . . . provisions of . . . such Act (1) with respect to work . . . performed in a workplace to which the exemption in section 213(f) . . . is applicable. . . ." *Id.* §216(d). Section 16(d) is itself incorporated into the ADEA by 29 U.S.C. §626.

<sup>5</sup> 608 F.Supp. 377, 380-81.

<sup>6</sup> See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §38 note 1 ("statutes designed to be applied to conduct taking place outside the United States usually expressly so provide").

<sup>7</sup> See *Cleary*, 555 F.Supp. at 1259; *Pfeiffer v. Wm. Wrigley Jr. Co.*, 573 F.Supp. 458, 459 (N.D. Ill. 1983), *aff'd*, 755 F.2d 554 (7th Cir. 1985).

<sup>8</sup> 29 U.S.C. §213(f) (1982). Both the *Cleary* and the *Pfeiffer* courts omitted the reference to the four listed sections, and cited §13(f) as applicable broadly to "this title."

sections are the FLSA provisions dealing with maximum hours, minimum wages and child labor; age discrimination is not included. In fact, the FLSA's general discrimination section, 29 U.S.C. §215, which includes the ADEA's age discrimination prohibition, is not territorially limited in its application. Thus, the *De Yoreo* court arguably misread the inference of the statutory scheme; rather than showing an intent to preclude extraterritorial application, the language of section 13(f) impliedly authorizes extraterritorial application of the law, including the ADEA, except as otherwise provided.

As a practical matter, the question has recently been overtaken by congressional action. Responding to the inequities of denying the ADEA's benefits to Americans overseas, Congress amended the Act in 1984 to make it applicable to U.S. citizens employed abroad by American companies.<sup>9</sup> Thus, the questionable analysis of *De Yoreo* and its predecessors is now moot in most cases.<sup>10</sup>

#### DECISION OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL

*Expropriation—standard of compensation under international law—"fair market value" versus "prompt, adequate and effective" compensation*

INA CORP. v. THE ISLAMIC REPUBLIC OF IRAN. AWD 184-161-1.  
Iran-United States Claims Tribunal, The Hague, August 13, 1985.

INA Corporation, a United States company, filed a claim before the Iran-United States Claims Tribunal<sup>1</sup> seeking compensation for the Iranian Government's nationalization of INA's ownership interest in Bimeh Shargh, an Iranian insurance company. INA requested compensation based upon the going concern value of its ownership share, plus interest and costs. Chamber One of the Claims Tribunal, in a per curiam decision, found for the claimant and held: that INA was entitled to compensation measured by the "fair market value" of its share of the Iranian company. Each of the three arbitrators wrote a separate opinion, with Arbitrators Lagergren and Holtzmann concurring in the award, and Arbitrator Ameli dissenting.<sup>2</sup>

INA had acquired its shares of Shargh stock in May 1978. It paid one-half of the purchase price at that time and agreed to pay the remaining amount no later than June 17, 1979. INA did not make the latter payment.<sup>3</sup> On June 25, 1979, the Government of Iran enacted a law nationalizing the

<sup>9</sup> See the Older Americans Act Amendments of 1984, Pub. L. No. 98-459, §802 (to be codified at 29 U.S.C. §630). The amendment took effect in 1984 after the plaintiff's claim arose.

<sup>10</sup> While the *De Yoreo* court made no mention of the amendment, Judge Posner of the Seventh Circuit recently explained, in a very similar case, that the amended provisions do not apply retroactively. See *Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985). Notice of appeal to the Fifth Circuit was filed in *De Yoreo* June 25, 1985.

<sup>1</sup> For background information on the Iran-United States Claims Tribunal, see 77 AJIL 642 (1983).

<sup>2</sup> Arbitrator Ameli's opinion has not yet been circulated. Although Ameli dissented from the award, he noted in a brief declaration that he joined in Judge Lagergren's separate opinion.

<sup>3</sup> INA alleged before the Tribunal that the due date had been postponed for 2 years, an allegation contested by the respondents. The Tribunal held that resolution of the issue was not necessary.



insurance industry, including Shargh. INA received no compensation for the value of its share of Shargh; and on December 17, 1981, it filed a claim with the Tribunal.

The key question presented to the Tribunal was the appropriate level of compensation to be paid by the Iranian Government for the nationalized shares of Shargh. INA argued that general principles of international law and the Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States<sup>4</sup> required payment of "prompt, adequate and effective" compensation. This, it was argued, meant compensation equal to the "full market" value or "going concern" value of the expropriated property. The Iranian Government argued that net book value was the proper basis for measuring the amount of compensation. It also submitted an audit report that assessed the value of Shargh as "negative"; therefore, according to the Iranian Government, no compensation was due.

The Tribunal award found the nationalization to be lawful and acknowledged that compensation was due to the claimant. Turning to this issue, the Tribunal suggested that in the event of a large-scale, lawful nationalization, "international law has undergone a gradual reappraisal, the effect of which may be to undermine the doctrinal value of any 'full' or 'adequate' (when used as identical to 'full') compensation standard as proposed in this case." Nevertheless, the Tribunal concluded that in the present case, which involved a small capital investment, "international law admits compensation in an amount equal to the fair market value of the investment." It noted that the Treaty of Amity, whose validity had not been challenged, entitled INA to the "fair market value" of its shares in Shargh, valued as of the date of nationalization. "Fair market value" was defined as the amount a willing buyer would pay a willing seller in an arm's-length transaction, "disregarding any diminution of value due to the nationalisation itself or the anticipation thereof, and excluding consideration of events thereafter that might have increased or decreased the value of the shares." In this case, because the nationalization occurred only a short time after INA purchased its shares, the Tribunal award relied on the purchase price of the shares as an accurate reflection of the fair market value.<sup>5</sup>

Although the award itself may be viewed as a straightforward treatment of the compensation issue, the separate opinions of Arbitrators Lagergren and Holtzmann provide an extended discussion of whether "full market value" is the appropriate international law standard of compensation in the event of an expropriation. Judge Lagergren (who has since retired from the Tribunal) argued that although "full compensation" has been awarded in cases of unlawful expropriations and has been specifically adopted in many bilateral treaties, it is not mandated by international law. Relying on statements by international law scholars<sup>6</sup> and a UN General Assembly resolution,<sup>7</sup>

<sup>4</sup> Aug. 15, 1955, 8 UST 899, TIAS No. 3853.

<sup>5</sup> In so holding, the Tribunal reviewed and dismissed as unreliable the audit on which the Iranian Government relied to show that the company had become worthless.

<sup>6</sup> See, e.g., 1 L. OPPENHEIM, *INTERNATIONAL LAW* 352 (8th ed. H. Lauterpacht 1955); Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 *AJIL* 553, 557 *et seq.* (1981).

<sup>7</sup> GA Res. 1803, 17 UN GAOR Supp. (No. 17) at 15, UN Doc. A/5217 (1962).

Lagergren suggested that the traditional rule of "prompt, adequate and effective" compensation should be modified to allow partial compensation when a government nationalizes property in the implementation of fundamental and large-scale economic reform. Lagergren stated that the appropriate and most regularly applied modern standard of compensation has been a flexible one of "just," "appropriate" or "partial" compensation. He observed that recent arbitral decisions seemingly support this standard.<sup>8</sup> According to Lagergren, the Iran-United States Claims Tribunal itself had in the past endorsed the notion of a more flexible standard.<sup>9</sup> Relying on these sources, Lagergren concluded in his separate opinion:

[A]n application of current principles of international law, as encapsulated in the "appropriate compensation" formula, would in a case of lawful large-scale nationalisations in a state undergoing a process of radical economic restructuring normally require the "fair market value" standard to be discounted in taking account of "all circumstances."

Arbitrator Holtzmann challenged the interpretation of the sources of international law cited in Judge Lagergren's opinion. He noted that UN General Assembly Resolution 1803 was intended to mean "full" or "adequate" compensation; indeed, on the basis of that understanding, the United States had withdrawn an amendment to the resolution that would have made this understanding explicit. Similarly, Holtzmann found that many international arbitral decisions, including those cited by Lagergren, commonly referred to "appropriate compensation" as meaning "full" compensation. Thus, in the *TOPCO* arbitration, the arbitrator applied the "appropriate compensation" standard and held that it required either *restitutio in integrum* or an award of damages that would place the claimant in the same position as would restitution.<sup>10</sup> Likewise, both the *Chorzów Factory* case<sup>11</sup> and the *AMINOIL* arbitration<sup>12</sup> supported a standard of compensation for "the full, going concern value of the expropriated rights."<sup>13</sup> Holtzmann observed that in two cases decided by the Iran-United States Claims Tribunal, full compensation was awarded,<sup>14</sup> and in one of those cases, Chamber Two explained

<sup>8</sup> For example, Judge Lagergren quoted *Texas Overseas Petroleum Co./California Asiatic Oil Co. v. Government of the Libyan Arab Republic*, 17 ILM 3, 30, para. 87 (1978), 53 ILR 389 (1977) [hereinafter cited as *TOPCO*], where the arbitrator explained that "the test of 'appropriate compensation' had come to represent the '*opinio juris communis*' that reflected 'the state of customary law existing in this field'." He also quoted *Kuwait and the American Independent Oil Co.*, 21 ILM 976, 1033, para. 144 (1982) [hereinafter cited as *AMINOIL*] ("appropriate" compensation would allow "an enquiry into all the circumstances relevant to the particular concrete case").

<sup>9</sup> See *Oil Field of Texas, Inc. and The Government of the Islamic Republic of Iran*, ITL 10-43-FT (Dec. 9, 1982) (Full Tribunal), reprinted in 1 IRAN-U.S. CLAIMS TRIBUNAL REP. 347 (1981-82).

<sup>10</sup> *TOPCO*, 17 ILM at 32, 34.

<sup>11</sup> *Factory at Chorzów (Merits)* (Ger. v. Pol.), 1928 PCIJ, ser. A., No. 17.

<sup>12</sup> *AMINOIL*, 21 ILM at 1035-37, 1041.

<sup>13</sup> Holtzmann argued that the Tribunal's award in *Oil Field of Texas* used the term "appropriate compensation" to emphasize that some compensation was due, but not to suggest that an amount less than full compensation should be paid.

<sup>14</sup> *American International Group, Inc. and Islamic Republic of Iran*, AWD 93-2-3 (Dec. 19, 1983) (Chamber 3), reprinted in 4 IRAN-U.S. CLAIMS TRIBUNAL REP. 96 (1983 III); and *Tippett*,

that "[t]he Claimant is entitled under international law and general principles of law to compensation for the full value of the property of which it was deprived."<sup>15</sup> Holtzmann concluded that the support for Lagergren's thesis "boils down to the writings of a handful of commentators" which, for a number of reasons, are "not persuasive in this context."

The extended debate in the *INA* award between Arbitrators Lagergren and Holtzmann reflects, to some extent, what many observers view to be competing interests within the international community: the interests of lenders and investors (both public and private) in the security of their economic undertakings, and the sovereign authority of governments to regulate their nations' economic development pursuant to their perception of the national interest. Holtzmann's concluding observation is well taken: "[J]ustice demands, as it always has, that a party who has been deprived of his property should be made whole; and in an economically interdependent world the law should encourage investment, not discourage it by increasing its risks." This may well be all the more accurate today, when one of the principal vehicles to remedy the lingering international debt crisis is increased foreign investment, and when private, not public, funds are the main source of investment capital.

#### CURRENT DEVELOPMENTS REGARDING JUDICIAL DECISIONS REPORTED IN THE JOURNAL, 1985

- Airline Pilots Association, International v. TACA International Airlines, S.A.*, 748 F.2d 965, 79 AJIL 737; *cert. denied*, 105 S.Ct. 2324.
- Allied Bank International v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 79 AJIL 733; *appeal pending*.
- Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, 594 F.Supp. 1553, 79 AJIL 458; *vacated*, 658 F.2d 903.
- Greenham Women against Cruise Missiles v. Reagan*, 591 F.Supp. 1332, 79 AJIL 746; *aff'd*, 755 F.2d 34.
- Handel v. Artukovic*, 601 F.Supp. 1421, 79 AJIL 1067; *aff'd*, No. 85-5633 (9th Cir. Oct. 11, 1985).
- Letelier v. Republic of Chile*, 748 F.2d 790, 79 AJIL 447; *cert. denied*, 105 S.Ct. 2656.
- McDonnell Douglas Corp. v. Islamic Republic of Iran*, 591 F.Supp. 293, 79 AJIL 751; *aff'd*, 758 F.2d 341.
- Ramirez v. Weinberger*, 745 F.2d 1500, 79 AJIL 449; *vacated*, 105 S.Ct. 2353.
- Siderman v. Republic of Argentina*, No. CV 82-1772-RMT (MCx) (C.D. Cal. 1985), 79 AJIL 1065; *appeal pending*, No. 85-5773 (9th Cir. Apr. 5, 1985).

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Abbott, McCarthy, Stratton and TAMS-Affa Consulting Engineers of Iran, AWD 141-7-2 (June 29, 1984) (Chamber 2) [hereinafter referred to as *TAMS*].

<sup>15</sup> *TAMS*, *supra* note 14.

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## CURRENT DEVELOPMENTS

### THE THIRTY-SEVENTH SESSION OF THE INTERNATIONAL LAW COMMISSION

The International Law Commission held its 37th annual session from May 6 to July 26, 1985 under the Chairmanship of Ambassador Satya Pal Jagota. The Commission resumed consideration of the following substantive topics: the Draft Code of Offences against the Peace and Security of Mankind; state responsibility; the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier; jurisdictional immunities of states and their property; relations between states and international organizations; and the law of the non-navigational uses of international water-courses. The only other substantive item on the Commission's agenda, international liability for injurious consequences arising out of acts not prohibited by international law, was not taken up owing to the absence of the new special rapporteur for that topic.<sup>1</sup> The Commission provisionally adopted draft articles on three of the above topics, namely, state responsibility, the diplomatic courier and bag, and jurisdictional immunities. After reporting briefly on the election of four new members, this Note will review the substantive highlights of the 1985 session.

The 34 members of the ILC are elected by the UN General Assembly to serve concurrent 5-year terms, the current members having been elected in the fall of 1981. If vacancies arise during a given 5-year term, they are filled by the Commission itself, not the General Assembly, in accordance with Article 11 of the Commission's Statute.<sup>2</sup> Four such "casual vacancies," as they are referred to in the Statute, arose between the Commission's 1984 and 1985 sessions. They were created by the election of Ambassador Jens Evensen and Professor Ni Zhengyu to the International Court of Justice and the deaths of Professor Robert Quentin Quentin-Baxter and Minister Constantin A. Stavropoulos. Professor Quentin-Baxter and Minister Stavropoulos were highly valued and esteemed colleagues whose contributions to international law are well known. Their deaths are mourned by their colleagues in the United Nations and the international legal community. To fill the four vacancies, the Commission elected the following individuals to serve for the remaining 2 years of the current mandate: Professor Gaetano Arangio-Ruiz, Ambassador Jiahua Huang, Professor Emmanuel J. Roukounas and Professor Christian Tomuschat.

<sup>1</sup> The special rapporteurship was left vacant by the untimely death in September 1984 of Professor Robert Quentin Quentin-Baxter. The Commission at its 1985 session appointed Ambassador Julio Barboza to fill this vacancy. Ambassador Barboza submitted a preliminary report but was not able to be present to introduce it. In accordance with its usual method of work, the Commission postponed consideration of the report until it could be taken up in the presence of the special rapporteur.

<sup>2</sup> Statute of the International Law Commission, Art. 11, UN Doc. A/CN.4/4/Rev.2 (1982).

*Draft Code of Offences against the Peace and Security of Mankind*

At its 1985 session, the Commission discussed the third report on the draft code submitted by the special rapporteur, Minister Doudou Thiam.<sup>3</sup> This report contained a proposed outline of the code as well as a set of draft articles. The outline consists of two parts: part 1 deals with general matters such as the scope of the code, the definition of an offense against the peace and security of mankind, and the general principles governing the subject; part 2 sets forth the acts or practices constituting offenses against the peace and security of mankind. In connection with part 2, the special rapporteur indicated that he would review the traditional categorization of the offenses into crimes against peace, war crimes and crimes against humanity.

The draft articles proposed this year by the special rapporteur deal principally with crimes falling into the category of offenses against international peace and security, also denominated crimes against peace and threats to peace. These offenses were covered in Article 2, paragraphs (1) to (9) of the version of the code submitted by the Commission to the General Assembly in 1954.<sup>4</sup> The special rapporteur also proposed introductory articles on the scope of the draft and on the definition of an offense against the peace and security of mankind. At the conclusion of its discussion of the special rapporteur's report, the Commission referred the following articles to the Drafting Committee: draft Article 1, "Scope of the present articles"; draft Article 2, "Persons covered by the present articles"; draft Article 3, "Definition of an offence against the peace and security of mankind"; and draft Article 4(A), "Acts constituting an offence against the peace and security of mankind: the commission of an act of aggression." The latter draft article was referred to the Drafting Committee on the understanding that if the committee did agree upon a text of the article, it would be for the purpose of assisting the special rapporteur in the preparation of his fourth report. As it happened, the Drafting Committee did not have time to take up any of the draft articles on this topic at the 1985 session.

The version of draft Article 2 referred to the Drafting Committee confines the scope of the code *ratione personae* to "individuals." The Commission's provisional decision not to make states per se subject to the code makes sense for several reasons. It is in keeping with the approach of the 1954 version of the code, as well as with the Nuremberg Principles,<sup>5</sup> and avoids

<sup>3</sup> For those not familiar with the Commission's methods of work, it should be emphasized that reports of special rapporteurs, which are ultimately published in volume II, part 1 of the *Yearbook of the International Law Commission*, are solely the work of the rapporteurs and do not necessarily reflect the views of the Commission as a whole.

<sup>4</sup> For the 1954 version of the code, UN Doc. A/CN.4/85 (1954), see 9 UN GAOR Supp. (No. 9) at 9, UN Doc. A/2693 (1954), reprinted in [1954] 2 Y.B. INT'L L. COMM'N 112, UN Doc. A/CN.4/SER.A/1954/Add.1. It is also reproduced in the Report of the International Law Commission on the Work of its Thirty-fifth Session, 38 UN GAOR Supp. (No. 10) at 13, UN Doc. A/38/10 (1983). For a brief discussion of the background of the Commission's work on the draft code, see McCaffrey, Current Developments Note, 78 AJIL 457, 472-73 (1984).

<sup>5</sup> Principles of International Law Recognized in the Charter of the Nuernberg Tribunal and in the Judgment of the Tribunal, text adopted by the International Law Commission at its

having the Commission make a "two-track" study of a controversial issue, the "criminal" responsibility of states. The Commission is already considering that issue in its work on state responsibility. Even if the code is addressed only to individuals, however, it seems likely that the Commission's study of state responsibility will have some influence on its work on the draft code. The potential for such influence is illustrated by the fact that the first alternative of Article 3 as proposed by the special rapporteur, defining an "offence against the peace and security of mankind," is taken verbatim from Article 19 of the draft on state responsibility.<sup>6</sup> Some members of the Commission questioned the appropriateness of this approach, but the position of the Commission as a whole will not be known until the article is reported out of the Drafting Committee and provisionally adopted by the Commission.

Draft Article 4 contains a list of acts proposed by the special rapporteur as offenses against the peace and security of mankind. The list is not exhaustive since, as noted above, the report deals only with those offenses which relate to international peace and security and not with those traditionally classified, respectively, as war crimes and crimes against humanity. The acts proposed for inclusion in draft Article 4 are the following: commission of an act of aggression; recourse to a threat of aggression; interference in the internal or external affairs of another state; undertaking or encouragement of terrorist acts, or the toleration of the organizing of terrorist acts to be carried out in another state; breach of a treaty designed to ensure international peace and security; and forcible establishment or maintenance of colonial domination. The first of these offenses, aggression, is contained in Article 4(A), which was sent to the Drafting Committee under the terms of reference described above. This offense, as well as the others just mentioned, will doubtless be subjected to further debate at the Commission's next session.

Given the fact that Article 4 is thus at an embryonic stage of development, a detailed account of the Commission's discussion of it would not be particularly useful at this juncture.<sup>7</sup> Suffice it to say that a number of the proposed offenses it contains, as well as the definitions and examples accompanying some of them, generated significant controversy within the Commission. Some members did not view all of the proposed offenses as appropriate for inclusion, while others regarded the list as being incomplete. Some proposed

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second session, in 1950, and submitted to the General Assembly. See [1950] 2 Y.B. INT'L L. COMM'N 374, UN Doc. A/CN.4/SER.A/1950/Add.1(pt.2). Principle I reads: "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment."

<sup>6</sup> Article 19, "International crimes and international delicts," is intended to distinguish between states' internationally wrongful acts of different degrees of seriousness: the most serious have been denominated provisionally—and, in the author's view, inaccurately—international "crimes," and the less serious international "delicts." For the text of Article 19, see [1979] 2 Y.B. INT'L L. COMM'N 1, 92, UN Doc. A/CN.4/SER.A/1979/Add.1(pt. 2).

<sup>7</sup> The text of Article 4, as well as a summary of the Commission's discussion of it, is contained in the Commission's report to the General Assembly on its 1985 session, 38 UN GAOR Supp. (No. 10) at 27-34, UN Doc. A/40/10 (1985).

offenses were generally acceptable while their definitions were not. In short, even though the special rapporteur has indicated his intention to proceed to the next general category of offenses in his 1986 report, it seems likely that those covered in his 1985 report will require considerable further study by the Commission.

### *State Responsibility*

In his 1985 report on state responsibility, the special rapporteur, Professor Willem Riphagen, provided commentaries to the 12 articles he had proposed in 1984. These articles, together with the four articles provisionally adopted by the Commission in 1983, would complete part 2 of the draft, which deals with the consequences of state responsibility. The Commission in 1985 discussed Articles 5 to 16 but was able to adopt only Article 5. That article, however, is the cornerstone of part 2 of the draft in that it defines the circumstances under which a state qualifies as an "injured State" and is thus able to avail itself of the remedies provided for in the subsequent articles. Article 5 as provisionally adopted provides as follows:

#### *Article 5*

1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One of the present articles, an internationally wrongful act of that State.

2. In particular, "injured State" means

(a) if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(b) if the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

(c) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(d) if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) the right has been created or is established in its favour;

(ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

(iii) the right has been created or is established for the protection of human rights and fundamental freedoms;

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, "injured State" means, if the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under articles 14 and 15], all other States.

Paragraph 1 provides a general definition of the term "injured State." Paragraph 2 contains a nonexhaustive, indicative list of circumstances in which a state will be considered to be an "injured State." These examples are arranged in a rough scale from the simplest and most common situations (e.g., the breach of a bilateral treaty) to the more complex and unusual situations (e.g., the breach of an obligation stipulated for the protection of "collective interests"). Paragraph 3 deals with "international crimes." Several of these provisions merit brief comment.

Paragraph 2(c) was not contained in the version of Article 5 originally proposed by the special rapporteur. Among the types of decisions contemplated by its proponents as falling within its scope are certain decisions of the UN Security Council (e.g., under chapter VII of the Charter) and General Assembly (e.g., under Article 17(2) of the Charter).

Paragraph 2(e)(iii) was also added to the version of Article 5 originally proposed by the special rapporteur. The present writer and others had argued that the article should clearly reflect the right of states not directly affected by the breach of certain obligations—in particular, those imposed by human rights norms—to respond in an appropriate fashion. Absent such a provision, no state could legally respond to such breaches except by way of acts of retorsion. It seems clear that in the case of such breaches, the "new" rights of the injured states (which would presumably be *all* other states) would not be identical to those of a state directly affected by the breach of, e.g., a bilateral treaty. Indeed, of the three categories of responses provided for by Articles 6 to 9 as proposed by the special rapporteur (reparation, reciprocity and reprisals), only the third seems to be potentially available to "injured States" in the case of human rights violations. Subsequent articles do impose limitations upon the right of "injured States" to respond; the remedies available to states that qualify as "injured" under Article 5, yet are not directly affected by the internationally wrongful act in question, will presumably be dealt with when those articles are considered by the Commission.

The notion of "collective interests" as employed in paragraph 2(f) was problematic for some members. The special rapporteur, while granting that it is unusual for multilateral treaties to provide for the protection of collective interests, maintained that such provisions do exist (in species protection conventions, for example) and that they should therefore be provided for in draft Article 5.

Paragraph 3 of Article 5 provides that if the internationally wrongful act is an "international crime," "all other States" are injured states. As was



mentioned above,<sup>8</sup> Article 19 of part 1 introduced the concept of "international crime" into the draft on state responsibility. That article distinguishes between what it calls "international crimes" and "international delicts." It uses the term "international crime" to refer to especially serious internationally wrongful acts, i.e., those resulting "from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole."<sup>9</sup> Some members of the Commission, including the author, have questioned the appropriateness of using the term "crime" to refer to such internationally wrongful acts. The concept of international criminal responsibility of states (as opposed to individuals) is controversial at best. Its ramifications—e.g., the types of "penal" consequences to which such responsibility would give rise—are little understood and less agreed upon. For these reasons, among others, some members of the Commission doubted the viability of paragraph 3. They also doubted its necessity, in view of the fact that the types of breaches it contemplates would be covered by paragraph 2(e)(i) and (iii).

Finally, the bracketed language in paragraph 3 refers to articles relating to the consequences of "international crimes" that have been proposed by the special rapporteur. These articles suggest that where one state commits an "international crime," "all other States" are not entitled to have free recourse to the full panoply of remedies provided for in Articles 6 to 9 (viz., reparation, reciprocity and reprisals), and that the manner in which they may respond is subject to the relevant provisions of the UN Charter.

### *The Diplomatic Courier and Bag*

The Commission once again made good progress on this topic, in keeping with its goal of finishing at least the first reading of the entire draft by 1986, the end of the ILC's current term. Provisional approval was given to eight draft articles, four of which deal with the courier and four with the bag.

By far the most controversial of the articles adopted on this topic in 1985 was Article 23, which deals with immunity of the courier from the jurisdiction of receiving and transit states.<sup>10</sup> The Commission had been unable to reach

<sup>8</sup> See note 6 *supra* and accompanying text. <sup>9</sup> Art. 19, para. 2, *supra* note 6.

<sup>10</sup> As provisionally adopted by the Commission, Article 23, which will be renumbered as Article 18, provides:

#### *Article 23 [18]*

##### *Immunity from jurisdiction*

1. The diplomatic courier shall enjoy immunity from the criminal jurisdiction of the receiving State, or, as the case may be, the transit State in respect of all acts performed in the exercise of his functions.

2. He shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State or, as the case may be, the transit State in respect of all acts performed in the exercise of his functions. This immunity shall not extend to an action for damages arising from an accident caused by a vehicle the use of which may have involved the liability of the courier where those damages are not recoverable from insurance.

agreement on a text of this article in 1984 and resumed consideration of it in 1985 in the light of comments made in the Sixth (Legal) Committee of the General Assembly in the fall of 1984. Some members of the Commission believed that a separate article on immunity was unnecessary since an article had already been adopted that grants the courier personal inviolability and exemption from any form of arrest or detention (Article 16). These members drew attention to the fact that there is currently considerable public pressure in some countries to cut back on diplomatic immunities in general. They therefore doubted that in this climate a provision going beyond the protections accorded by the 1961 Vienna Convention on Diplomatic Relations<sup>11</sup> would be generally acceptable to states. Other members approved of some, but not all, of the paragraphs as proposed by the special rapporteur, Professor Alexander Yankov, while still other members supported the version he had originally proposed.

The Commission ultimately reached a compromise formulation that expressly limits immunity from criminal jurisdiction to cases involving acts performed in the exercise of the courier's functions (para. 1), and similarly limits the courier's immunity from being called to give evidence as a witness (para. 4). It will be interesting to see how governments react to Article 23 in the Sixth Committee. At any rate, linking immunity to the performance of the courier's functions is only satisfactory to the extent that the temporal and material scope of those functions is clearly defined. This problem will be considered further in connection with the next article to be discussed, Article 28.

Article 28 deals with the duration of the courier's privileges and immunities.<sup>12</sup> The article itself gave rise to few substantive questions in the Com-

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3. No measures of execution may be taken in respect of the diplomatic courier, except in cases where he does not enjoy immunity under paragraph 2 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person, temporary accommodation or the diplomatic bag entrusted to him.

4. The diplomatic courier is not obliged to give evidence as a witness in cases involving the exercise of his functions. He may be required to give evidence in other cases provided that this would not cause unreasonable delays or impediments to the delivery of the diplomatic bag.

5. The immunity of the diplomatic courier from the jurisdiction of the receiving State or the transit State does not exempt him from the jurisdiction of the sending State.

<sup>11</sup> Apr. 18, 1961, 500 UNTS 95, 23 UST 3227 (entered into force Apr. 24, 1964). Like Article 16 of the Commission's current project on the courier and bag, Article 27(5) of the Vienna Convention provides that "[t]he diplomatic courier . . . shall enjoy personal inviolability and shall not be liable to any form of arrest or detention." It contains no provision concerning the immunity of the courier *vel non* from jurisdiction.

<sup>12</sup> Article 28, which will be renumbered as Article 21, provides as follows:

*Article 28 [21]*

*Duration of privileges and immunities*

1. The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or, as the case may be, the transit State in order to perform his functions, or, if he is already in the territory of the receiving State, from the moment he begins to exercise his functions. Such privileges and immunities shall

mission. Potential issues are raised, however, when the article is read in conjunction with Articles 10 (on the functions of the courier) and 11 (on the end of the functions of the courier). Article 28 provides in pertinent part that the courier enjoys privileges and immunities "from the moment he enters the territory of the receiving State . . . in order to perform his functions." According to Article 10, "[t]he functions of the diplomatic courier consist in taking custody of, transporting and delivering at its destination the diplomatic bag entrusted to him." And under Article 11, the courier's functions come to an end either when the sending state notifies the receiving state that they have terminated, or when the receiving state notifies the sending state that it refuses to recognize the person in question as a courier. If, for example, a courier is sent without a bag to state A to pick one up, does he enjoy privileges and immunities prior to taking custody of the bag in state A? The same question would arise where the courier delivers a bag in state A and returns to his home base (or continues on to pick up another bag elsewhere) without one. It seems clear that as long as the courier is on his way to pick up a bag or is returning to his home base, and is not on vacation (or, possibly, on a "frolic of his own"<sup>13</sup>), he should be considered to be performing his functions, even though he is not accompanying a bag.

On the other hand, Article 11 could be interpreted to mean that so long as the sending or receiving state has not given the requisite notice, the courier will be considered to be performing his functions whether he is on his way to pick up a bag or on vacation. If this rather improbable interpretation were accepted, Article 21 would seem to indicate that the courier would always enjoy privileges and immunities, whether actually on duty or not. This point is not directly addressed in the commentary to any of the articles in question.

Article 29 on waiver of immunities<sup>14</sup> is in keeping with the Commission's approach to the law of the jurisdictional immunities of states and their prop-

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normally cease at the moment when the diplomatic courier leaves the territory of the receiving State or the transit State. However, the privileges and immunities of the diplomatic courier *ad hoc* shall cease at the moment when the courier has delivered to the consignee the diplomatic bag in his charge.

2. When the functions of the diplomatic courier come to an end in accordance with article 11(b), his privileges and immunities shall cease at the moment when he leaves the territory of the receiving State, or on the expiry of a reasonable period in which to do so.

3. Notwithstanding the foregoing paragraphs, immunity shall continue to subsist with respect to acts performed by the diplomatic courier in the exercise of his functions.

<sup>13</sup> This is the now famous expression of Baron Parke in *Joel v. Morison*, 172 Eng. Rep. 1338 (1834), in instructing a jury on the circumstances in which they could find that a servant was acting in the scope of his employment.

<sup>14</sup> Article 29, which will be renumbered as Article 22, provides as follows:

*Article 29 [22]*

*Waiver of immunities*

1. The sending State may waive the immunities of the diplomatic courier.
2. Waiver must always be express, except as provided in paragraph 3 of this article, and shall be communicated in writing.

erty, discussed below. No serious objections were raised concerning the article, although it was noted that paragraph 3 could be viewed as an exception to the general rule that the immunities enjoyed by diplomatic agents and administrative and technical staff are technically immunities of the state, and thus cannot be waived by the individual in question. Paragraph 4 parallels the approach proposed by the special rapporteur for jurisdictional immunities in that it treats immunity from adjudicative jurisdiction as being separate from immunity from enforcement jurisdiction.

Article 30 on the status of the captain of a ship or aircraft to whom a bag is entrusted<sup>15</sup> was not controversial. There was some discussion of whether the words "scheduled to arrive" in paragraph 1 refer only to "regularly scheduled" flights, and thus exclude the possibility of entrusting a bag to the captain of a chartered aircraft. It was generally agreed that the article would not exclude such an arrangement. As the commentary to this article explains, the requirement that the aircraft be "scheduled to arrive" is meant to indicate that aircraft in regular service are contemplated, as opposed to ad hoc flights. This is a practical requirement in view of the obligation of the receiving state set forth in paragraph 3 to provide free access to the aircraft—an obligation that could be difficult to fulfill for ad hoc flights.

Article 31 on identification of the bag<sup>16</sup> requires no comment. Article 32

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3. The initiation of proceedings by the diplomatic courier shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary.

5. If the sending State does not waive the immunity of the diplomatic courier in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

<sup>15</sup> Article 30, which will be renumbered as Article 23, provides as follows:

*Article 30 [23]*

*Status of the captain of a ship or aircraft entrusted with the diplomatic bag*

1. The captain of a ship or aircraft in commercial service which is scheduled to arrive at an authorized port of entry may be entrusted with the diplomatic bag of the sending State or of a mission, consular post or delegation of that State.

2. The captain shall be provided with an official document indicating the number of packages constituting the bag entrusted to him, but he shall not be considered to be a diplomatic courier.

3. The receiving State shall permit a member of a mission, consular post or delegation of the sending State to have unimpeded access to the ship or aircraft in order to take possession of the bag directly and freely from the captain or to deliver the bag directly and freely to him.

<sup>16</sup> Article 31, which will be renumbered as Article 24, provides as follows:

*Article 31 [24]*

*Identification of the diplomatic bag*

1. The packages constituting the diplomatic bag shall bear visible external marks of their character.

on the content of the bag<sup>17</sup> gave rise to few substantive problems. Since the draft is to apply to all types of couriers and bags,<sup>18</sup> paragraph 1 is formulated somewhat differently from the corresponding provision of the 1961 Convention (Article 27(4)). In addition to employing the adjective "official" in lieu of "diplomatic" to modify "correspondence," a comma was inserted after "correspondence" and the adverb "exclusively" was added. Some members questioned the necessity for this addition, noting that the word "exclusively" appears in the Vienna Convention on Consular Relations but not in the other three instruments upon which the present draft is based.<sup>19</sup> The commentary to the article reflects the Commission's decision to include the term for the time being, with the understanding that the question may be reexamined on second reading.<sup>20</sup>

### *Jurisdictional Immunities of States and Their Property*

At its 1985 session, the Commission provisionally adopted the final two articles on exceptions to immunity and began consideration of part IV of the draft, which concerns attachment and execution. The two articles adopted are Article 19, "State-owned or State-operated ships engaged in commercial service," and Article 20, "Effect of an arbitration agreement."

Article 19 proved quite troublesome. One reason was that common law admiralty terminology, which had been employed in the version of the article

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2. The packages constituting the diplomatic bag, if unaccompanied by a diplomatic courier, shall also bear a visible indication of their destination and consignee.

<sup>17</sup> Article 32, which will be renumbered as Article 25, provides as follows:

#### *Article 32 [25]*

##### *Content of the diplomatic bag*

1. The diplomatic bag may contain only official correspondence, and documents or articles intended exclusively for official use.

2. The sending State shall take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1.

<sup>18</sup> I.e., those governed by the 1961 Vienna Convention, *supra* note 11; the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 UST 77, TIAS No. 6820, 596 UNTS 261 (entered into force Mar. 19, 1967); the Convention on Special Missions, Dec. 8, 1969, Annex to GA Res. 2530, 24 UN GAOR Supp. (No. 30) at 99, UN Doc. A/7630 (1969); and the Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, *opened for signature* Mar. 14, 1975, UN Doc. A/CONF.67/16 (1975).

<sup>19</sup> The four conventions are listed in note 18 *supra*.

<sup>20</sup> The remaining two articles, Articles 34 and 35 (to be renumbered as Articles 26 and 27, respectively), require no comment. Article 34 [26], "Transmission of the diplomatic bag by postal service or by any mode of transport," provides: "The conditions governing the use of the postal service or of any mode of transport, established by the relevant international or national rules, shall apply to the transmission of the packages constituting the diplomatic bag." Article 35 [27], "Facilities accorded to the diplomatic bag," provides: "The receiving State or, as the case may be, the transit State shall provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag."

originally proposed by the special rapporteur, Ambassador Sompong Sucharitkul, was not intelligible to a number of members. More important, however, there was sharp disagreement on the fundamental issue of whether the article should refer to a ship engaged in "commercial" service or to one engaged in "commercial non-governmental" service. The Commission was not able to reach agreement on this issue and, as a result, the words "non-governmental" appear in brackets.<sup>21</sup> In the author's view, the principal difficulty with adding the term "non-governmental" is that it implies that a ship could be engaged in "commercial governmental" service, and that it would enjoy immunity in such a case. The difference of views on this issue serves as a reminder that the Commission has never reached agreement on whether the nature or the purpose of an activity will control its characterization as commercial or strictly governmental.<sup>22</sup>

Article 19 provides for nonimmunity in "any proceeding relating to the operation of [a] ship" engaged in "commercial [non-governmental]" service. Paragraph 3 defines the "proceedings" envisaged.<sup>23</sup> The definition is an inclusive one, yet seemed to some members (including the author) to be unduly restrictive. It was adapted from Article 3, section 1 of the 1926 Brussels Convention on the immunity of state-owned vessels.<sup>24</sup> That article deals with ships engaged in *governmental* service,<sup>25</sup> and some members questioned the appropriateness of using it as a model in the context of ships employed in commercial service. The commentary to Article 19 does explain that the term "operate" "covers a wide field of maritime activities," including construction of ships, contracting for marine insurance, and maritime liens and mortgages.

Article 20 deals with the effect of a state's entering into an agreement to arbitrate. It provides, in essence, that by entering into such an agreement, the state waives its immunity in proceedings involving the exercise of supervisory jurisdiction by a court of another state. The types of proceedings envisioned are set out in paragraphs (a) through (c).<sup>26</sup> While an action to enforce the arbitration agreement is not expressly mentioned, paragraph 1 of the commentary indicates that such a proceeding would be covered, ap-

<sup>21</sup> Paragraph 1 of the article thus provides that "a State may not invoke immunity" in a "proceeding relating to the operation of [a] ship . . . in use or intended exclusively for use for commercial [non-governmental] purposes."

<sup>22</sup> See the discussion of Article 3, paragraph 2 in the Note on the Commission's 1983 session, *supra* note 4, at 463-64.

<sup>23</sup> Included are proceedings concerning claims in respect of (a) collision or other navigational accidents, (b) assistance, salvage or general average, and (c) repairs, supplies or other contracts relating to the ship.

<sup>24</sup> International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, done at Brussels, Apr. 10, 1926, 176 LNTS 199.

<sup>25</sup> Article 3, section 1 of the 1926 Brussels Convention in its second paragraph deals with the very limited circumstances under which an individual has the right to bring an action in the state owning or operating a vessel that, at the time the cause of action arose, was being used "exclusively on governmental and non-commercial service."

<sup>26</sup> They relate to: (a) "the validity or interpretation of the arbitration agreement," (b) "the arbitration procedure," and (c) "the setting aside of the award."

parently by paragraph (a). Article 20 contains no provision on enforcement of arbitral awards. The special rapporteur has indicated that this subject will be covered in part IV, which deals with enforcement generally.

*Relations between States and International Organizations (Second Part)*

This topic deals with the status, privileges and immunities of international organizations, their officials, experts and other staff members who are not representatives of states.<sup>27</sup> At its 1985 session, the Commission discussed the second report of the special rapporteur, Ambassador Leonardo Díaz-Gonzales. The report dealt in broad outline with the "notion" of an international organization and the legal personality of international organizations, and contained a proposed draft article on "Legal personality." The article was not considered ripe for referral to the Drafting Committee and will be discussed again, possibly in revised form, when the Commission next takes up the topic. As the topic is still in its formative stages, it is too early to pass final judgment on its viability. However, some members doubted whether it was feasible to draft one set of principles to govern the wide variety of international organizations that exist in the world today. And the Commission's task will be made no easier by current moves to restrict, or at least define more sharply, the privileges and immunities of the staff of certain international organizations.<sup>28</sup>

*Non-navigational Uses of International Watercourses*

The previous special rapporteur for this topic, Ambassador Jens Evensen, was elected to the International Court of Justice in November 1984. To fill the resulting vacancy, the Commission during the 1985 session appointed the author as special rapporteur and requested that he submit a brief report during that session indicating the status of the topic and his plans for further action. Such a report was submitted and briefly discussed by the Commission. The report indicated the intention to preserve the continuity of the Commission's work on watercourses insofar as possible in the interest of maximizing progress on the topic. This approach received the Commission's general endorsement.

STEPHEN C. MCCAFFREY\*

<sup>27</sup> In 1971 the Commission completed a set of draft articles on the status, privileges and immunities of the representatives of states to international organizations. This draft formed the basis of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, *supra* note 18. In 1976 the Commission began work on the present draft, which has been denominated the "second part" of the topic.

<sup>28</sup> See, e.g., the "Roth Amendment" to the State Department authorization bill, Foreign Relations Authorization Act, Fiscal Years 1986-1987, Pub. L. No. 99-93, 99 Stat. 405 (1985), which imposes certain restrictions on the travel of UN civil servants.

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CALIFORNIA BECOMES LATEST STATE TO CONSIDER  
"FOREIGN LEGAL CONSULTANT"

In September 1985, the California State Bar Convention recommended that the California Bar reconsider the California Certified Foreign Legal Consultant Proposal<sup>1</sup> "in light of a number of substantive concerns regarding the text of the proposal."<sup>2</sup> The proposal would have permitted lawyers from other countries, evincing the good moral character and general fitness required of members of the California Bar, to give specified legal advice in California. Alien lawyers could thereby engage in a limited practice, without taking the state bar examination, offering advice regarding the laws of the countries where they have been admitted to practice for 5 of the last 7 years. The Foreign Legal Consultant, however, would be barred from appearing on behalf of clients, preparing wills or other instruments affecting U.S. property, and dealing with matters involving the marital relationships of U.S. residents.<sup>3</sup>

Although this special licensing of foreign lawyers is suddenly "on the back burner" in California after 3 years of scrutiny,<sup>4</sup> similar licensing has been adopted or proposed elsewhere. In 1975 New York was the first state to establish a Foreign Legal Consultant license.<sup>5</sup> By 1984 approximately 70 foreign lawyers were so licensed, all of whom are located in New York City—a center of international trade and finance.<sup>6</sup> They have established offices on behalf of major foreign law firms from the United Kingdom, Israel, Italy, the Netherlands and some Latin American countries.<sup>7</sup>

In December 1984, the District of Columbia Bar's Foreign Legal Consultants Committee submitted a proposal "substantially similar to the proposed [California] Rule."<sup>8</sup> The District of Columbia committee stated:

We believe that the licensing of Special Legal Consultants in the District of Columbia would significantly facilitate the development of the District as an international commercial and financial center without causing any adverse effect on the existing members of the Bar. Indeed, . . . the licensing of foreign lawyers here should produce significant new business for local law firms. Over the past seven years the District Government and business leaders have made concentrated efforts to attract new foreign investment to the District. We believe that the

<sup>1</sup> Report of Special Committee on Registered Foreign Legal Consultants, June 10, 1985 (memorandum submitted to Board of Governors of the California State Bar, a copy of which is on file with the author) [hereinafter cited as Report].

<sup>2</sup> Late Filed Res. No. 3, Los Angeles Daily J., Oct. 2, 1985, at 6, col. 2.

The "substantive concerns" have not yet been officially reported, although the editor of the *California Lawyer* (state bar journal) advises that an article on point will be published in a future issue. It appears that the proposal will be revised in the light of these concerns and resubmitted for another vote at a future state bar convention.

<sup>3</sup> Report, *supra* note 1, at 3.

<sup>4</sup> The Special Committee on Registered Foreign Legal Consultants was formed in 1982.

<sup>5</sup> See Slomanson, *Foreign Legal Consultant: Multistate Model for Business and the Bar*, 39 ALBANY L. REV. 199 (1975).

<sup>6</sup> 10th Anniversary Nears for Legal Consultants, N.Y.L.J., Jan. 4, 1984, at 1, col. 4.

<sup>7</sup> *Id.* at 2, col. 3. See also *Foreign Firms Invade the U.S.: An Asset to Bar?*, Nat'l L.J., Oct. 29, 1984, at 1.

<sup>8</sup> Report, *supra* note 1, at 1.



District can be even more competitive in winning this investment if it can provide foreign investors the same kind of opportunity to consult foreign lawyers here as is now possible in the state of New York.<sup>9</sup>

California's Special Committee on Registered Foreign Legal Consultants recently echoed this sentiment by stating:

Our committee views adoption of the Rule to be important not in simply enabling California lawyers to practice in Japan but also as a means of facilitating international transactions both directly by involvement of foreign legal consultants, and indirectly by creating an environment conducive to sophisticated international transactions. Lawyers well versed in the laws of foreign nations are frequently required in international transactions and if California is to maintain its status in the international business community, its restrictions on foreign lawyers should be eased.<sup>10</sup>

The Japanese hold qualified foreign legal advice in esteem,<sup>11</sup> in contrast to the Soviets who maintain exclusive control over the representation of their nationals in foreign legal matters: a Soviet citizen is prohibited from obtaining legal representation outside the USSR, except through the lawyers' collective in the Ministry of Justice.<sup>12</sup> U.S. practice is typically concerned with protecting the public through a local bar monopoly. The New York, District of Columbia and California experiences, one hopes, will continue to create legislative momentum for special rules regarding the regulation of foreign lawyers.

Establishment of a limited Foreign Legal Consultant category of practice serves three purposes of interest to attorneys generally licensed in the United States. First is the increased local availability of foreign lawyers knowledgeable in the intricacies of practice in foreign nations.<sup>13</sup> This exposure would help not only the large U.S. firms dealing in international trade, but also the smaller companies able to retain the local advice of a foreign legal consultant. Second, many U.S. lawyers wish to express an attitude of international cooperation, demonstrated by the abandonment of exclusionary and isolationist tendencies that retard a state's share of expanding international commerce. Finally, the establishment of a Foreign Legal Consultant certification scheme would open the door to the expansion of local law firms into the international marketplace. Severe restrictions through a local bar monopoly may not serve the interest of the public or of the bar itself,<sup>14</sup> particularly for those firms that desire to "go international" but face expectations of reciprocity in foreign nations.<sup>15</sup>

<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Id.*

<sup>11</sup> Fukuhana, *The Status of Foreign Lawyers in Japan*, 17 JAPAN ANN. INT'L L. 21 (1973).

<sup>12</sup> See, e.g., *In re DeSautels*, 1 Mass. App. Ct. 787, 789 n.4, 307 N.E.2d 576, 579 n.4 (1974) (describing Soviet practice).

<sup>13</sup> See, e.g., Comment, *International Legal Practice Restrictions on the Migrant Attorney*, 15 HARV. INT'L L.J. 298 (1974) (discussing momentum for establishing special rules regarding foreign lawyer regulation).

<sup>14</sup> See, e.g., Comment, *Foreign Branches of Law Firms: The Development of Lawyers Equipped to Handle International Practice*, 80 HARV. L. REV. 1284, 1288-97 (1967) (arguing that such restrictions serve neither).

<sup>15</sup> Weber, *The Asian Connection*, CAL. LAW., Nov. 1983, at 26, 29 (discussing reciprocity problem).

On balance, the perceived dangers to a public not served exclusively by members of the local bar must be weighed against the availability of direct access to certified foreign lawyers able to serve both the local public and the local bar. Dangers to the public can be controlled by a certification scheme similar to the New York model,<sup>16</sup> which has served New York's lawyers and clients so well for the last 10 years.<sup>17</sup> New York City lawyers do not need to incur prohibitive telephone charges or to lose time by writing to distant and unknown foreign lawyers as a result of their access to locally certified Foreign Legal Consultants. Lawyers in the District of Columbia and California, by encouraging legislative momentum toward easing restrictions upon foreign lawyers desiring to practice in those regions, are promoting better service for their clients. International transactions can be directly simplified by the presence of a Foreign Legal Consultant and indirectly simplified by the development of an atmosphere conducive to sophisticated international transactions.

WILLIAM R. SLOMANSON\*

#### THOMAS BUERGENTHAL ELECTED PRESIDENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

On September 4, 1985, Judge Thomas Buergenthal, Professor of International Law at the Emory University Law School, was elected President (chief justice) of the Inter-American Court of Human Rights. The Court, established in 1979 under the auspices of the Organization of American States, has its permanent seat in San José, Costa Rica.

Professor Buergenthal, a member of the Board of Editors of the *American Journal of International Law*, is the American member of the seven-judge Court. He has served as Dean of the Washington College of Law of American University and is a distinguished writer and teacher. He has been active in human rights causes and is a prominent member of the American Society of International Law.

The main function of the Inter-American Court of Human Rights is to apply and interpret the American Convention on Human Rights. Nineteen OAS member states are parties to this international agreement, which seeks to guarantee basic civil and political rights and fundamental freedoms.

The election of Judge Buergenthal is a great honor for the United States, as well as for AJIL and ASIL. His many colleagues and friends wish him a productive term in the advancement of law as first shield against those who would victimize and brutalize humanity, forces with which he is all too personally familiar.

T.M.F.

<sup>16</sup> N.Y. ADMIN. CODE tit. 22, §521.1-.5 (Ct. App.), §610.1-.8 (Sup. Ct., 1st App. Dep't), §692.1-.8 (Sup. Ct., 2d App. Dep't).

<sup>17</sup> See *supra* note 6.

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## BOOK REVIEWS AND NOTES

EDITED BY DETLEV VAGTS

### A NOTE TO OUR READERS

Leo Gross served the *American Journal of International Law* as Book Review Editor from 1963 to 1985. Under his tutelage, the section expanded in both size and comprehensiveness and attracted a wide and faithful readership. The post is one of the *Journal's* most demanding and he has certainly earned the retirement he now chooses; he takes his leave with all readers and staff profoundly in his debt.

The Board of Editors is pleased to announce that, with this issue, Detlev Vagts begins his term as Book Review Editor. Correspondence about reviews should be addressed to Professor Vagts at the Harvard Law School (Langdell 365, Cambridge, Massachusetts 02138).

### REVIEW ARTICLE

*The League of Nations in Retrospect: Proceedings of the Symposium.* Organized by The United Nations Library and The Graduate Institute of International Studies, Geneva 6–9 November 1980. Berlin and New York: Walter de Gruyter, 1983. Pp. xii, 427. Name index. In English and French. DM 164; \$74.60.

It was an excellent idea on the part of Heinz Waldner (Chief Librarian, UN Library at Geneva) and Christian Dominicé (Director of the Graduate Institute of International Relations at Geneva) to mark the 60th anniversary of the first League Assembly in 1920 by arranging a symposium on the experience of the League and publishing the papers in this volume. The object of the symposium and of the papers was to present a sort of "state of the cart" (p. 405; probably no pun intended but only a misprint) in light of new information which has become available to students of the League by the opening of national archives (p. xi). Indeed, the papers cover many aspects of the activities of, and national attitudes towards, the League. However, as noted by the contributors, there are no studies of the French attitude toward the League (pp. 12, 406), the Permanent Court of International Justice (p. 7) and the International Labour Organisation and other technical agencies (pp. 11, 406).<sup>1</sup> The codification of international law was also not considered.

<sup>1</sup> Among other gaps are studies on the role of small powers (p. 13) and of Latin American members in the League (p. 406), its historical roots in 19th-century diplomacy by conference (pp. 13–14), the relation of nonmember states to the League (p. 406), and the role of public opinion, the news media and the leading personalities inside and outside the League (p. 406). Some of these personalities are lovingly recalled in the short "Réminiscences" by Vladimir

Between the introductory essay by Zara Steiner (pp. 1–15) and the “Post-face” by Marlis G. Steinert and Victor-Yves Ghebali (pp. 405–07), there are 21 papers covering in varying detail aspects of the League experience.

In chapter I, “The League of Nations: Institutional Aspects,” Jean Siotis traces the origins of the League to the Concert of Europe, stresses the importance of the 1930 Bruce Report as a model for the Economic and Social Council (ECOSOC) of the United Nations and states that while the United Nations came closer to universality than the League, “had it not been for the League and for those dedicated to its ideals, the United Nations would again have been—at best—a short-lived alliance of the victorious Great Powers” (p. 30).

Martin D. Dubin provides a very good and detailed overview of the origins and objectives of the Bruce Report in the framework of international politics as they affected the functioning of, and the prospects for, the League. He stresses its significance for the development of “welfare ethics” in the League (pp. 48–49), and the contribution of the Secretariat, in particular of Secretary-General Avenol, in its elaboration in the hope that the proposed Central Committee for Social and Economic Questions would in some measure compensate for the political failure of the League (p. 58). While it is generally acknowledged that the Bruce Report served as a model for ECOSOC, Dubin insists on the differences: ECOSOC lacks the autonomy and the direct participation of nongovernmental experts that the Central Committee was intended to have (p. 64).

James Barros, well known for his remarkable studies of the Secretaries-General of the League, discusses the evolution from the initial consideration of the head of the League organization as a “Chancellor” with substantial political power to that of a more modest “Secretary-General.” The change in title did not imply, as experience has shown, a limitation of authority. While Albert Thomas, the Director of the International Labour Office, played a very active role in public, Drummond and his high-ranking collaborators were politically active behind the scenes; “Like the British monarch the real value of the Secretary-General is his power, in private, to warn, advise and recommend. These were the qualities that made Drummond so effective a Secretary-General” (pp. 39–40). However, on a more pedestrian level, what made for the effectiveness of Drummond was his close link to British diplomacy. Barros refers to “an *ad hoc* arrangement whereby Drummond was allowed to examine confidential and secret Foreign Office documents, especially about questions of interest to the League” (p. 36).<sup>2</sup> It

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Socoline, who served the League as Under Secretary-General (pp. 409–12). This piece of “oral history” will be of interest to those who were personally acquainted with the Geneva actors. Socoline expresses the hope, shared by many of the contributors in one form or another, that the spark that was ignited in Geneva, despite many painful setbacks, will never be extinguished (p. 412).

<sup>2</sup> This “symbiotic” relationship was, in Barros’s view, unfairly criticized by some former Secretariat officials (p. 36). However, in order to appreciate this point, one would have to know more about Drummond’s second career as Lord Perth, British Ambassador in Rome during the period that was critical to the League and the Foreign Office, the Italo-Ethiopian war. His

was common ground to give credit to Drummond for having created the first truly international civil service. As Barros sees it, the Secretariat was for Drummond a "most important political tool," but

it was necessary for Drummond in his public role to disguise this fact and to propagate the myth of the non-political, impartial international civil service. . . . The more powerful the State the greater would be Drummond's deference in accepting its nominations for possible Secretariat appointments, in consulting the State about the proposed candidates, and in accepting and acting upon the advice and recommendations of the State concerned [p. 37].

In the United Nations, in the debate on the Congo operations, it was Dag Hammarskjöld who defended the "myth" against attacks by the Soviet Union, which had adopted Drummond's "realism," as did Hammarskjöld's successors.

In *La transition de la Société des Nations à l'organisation des Nations Unies*, the last paper in chapter I, Victor-Yves Ghebali presents the reasons, chiefly American and Russian, for dismantling the League, its liquidation and dissolution and finally the transfer of assets and certain activities to the United Nations. Tables on the inventory of League assets and financial disbursements to members are reproduced from official documents in two annexes.

For many readers chapter II, "States and the League of Nations: Case studies," will be of greatest interest. George W. Egerton's essay, *Great Britain and the League of Nations: Collective security as myth and history*, is an interesting attempt at a reevaluation of the League and its core concept of collective security. In conclusion, he says "that myth and history make unhappy if not uncommon bedfellows. The resurgence of the League of Nations historiography now underway has, in large measure, been a process of demythologization" (p. 113). Who were the mythmakers? The League of Nations Union and distinguished historians such as Arnold J. Toynbee and, above all, Frank P. Walters, whose history of the League of Nations appeared in 1952. This book has come to serve "as the standard history of the League. As such, it has had more influence than any other study, directly and indirectly through derivative literature, in shaping and reinforcing the dominant liberal internationalist mythology of the League" (p. 111). But although the British League of Nations Union promoted the illusion that collective security could be achieved without risking war, Walters wrote his history after the break-

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acceptance of this appointment motivated the UN General Assembly to include in the Terms of Appointment of the Secretary-General, approved on Feb. 1, 1946, Article 4(b) which reads:

Because a Secretary-General is a confidant of many governments, it is desirable that no Member should offer him, at any rate immediately on retirement, any governmental position in which his confidential information might be a source of embarrassment to other Members, and on his part a Secretary-General should refrain from accepting any such position [1946-47 U.N.Y.B. 82].

The injunction was complied with in the case of UN Secretaries-General Trygve Lie, U Thant and Kurt Waldheim.

down not of the League but of traditional diplomacy, which thought that peace "in our time" could be preserved by the 1938 Munich agreement and the policy of appeasement. Steiner reminds us that

in the thirties when the League had lost much of its political *raison d'être* and States reverted to non-aggression treaties and bi-lateral pacts, old methods did not work any better than new ones. If the presence of the League with its false hopes [and one might add the myth of collective security] complicated the tasks of traditional diplomacy, there is little evidence that the latter enjoyed any greater measure of success when unencumbered by League obligations [p. 8].

It may well be that even at the time the Covenant was drafted, in 1919, British officials would have preferred "the maximum of conference diplomacy and 'functional' cooperation" and "would have eschewed any independent executive powers or a security role based on obligatory international coercion" (p. 113). It may also be that this attitude "would be held with remarkable consistency by British officials right through the history of the League, despite rhetorical support for collective security and the obligations of the Covenant" (*id.*). However, a case could be made for the proposition that the link between Article 16 of the Covenant, the sanctions or coercion provisions, and the obligations for peaceful settlement of international disputes in Articles 12–15 was a distinctly British contribution. Be that as it may, Egerton is somewhat uncertain about the origin and meaning of collective security. The term did not come into popular use until 1934<sup>3</sup> but was used by Beneš in 1932 and was selected in 1933 by the International Studies Conference as a topic for its study cycle 1933–1935.<sup>4</sup>

It may be that 1933 or 1934 is the date for the popular use of the concept of collective security. However, it was used in 1924 by Beneš (Czechoslovakia) and Politis (Greece) in their General Report on *Arbitration, Security and Reduction of Armaments*. They refer to Article 8(1) of the Covenant<sup>5</sup> and go on to say that it recognizes

the duty of safeguarding the national security of the Members of the League and of safeguarding it, not only by the maintenance of a nec-

<sup>3</sup> Egerton relies here on the OXFORD ENGLISH DICTIONARY 113 n.4.

<sup>4</sup> The results of this study cycle were published by the League of Nations International Institute of Intellectual Cooperation in Paris: *COLLECTIVE SECURITY: A RECORD OF THE SEVENTH AND EIGHTH INTERNATIONAL STUDIES CONFERENCE* (M. Bourquin ed. 1936). I was particularly glad to see the references to the Institute and the International Studies Conference (pp. 103–04), which I served as an official from 1935 to 1940. While Egerton mentions the study on collective security, he does not mention the study cycle 1935–1937, which was devoted to some problems of peaceful change and in a sense, was the logical counterpart to collective security. The results of the 1935–1937 study cycle were edited again by Maurice Bourquin under the title *PEACEFUL CHANGE PROCEDURES, POPULATION, RAW MATERIALS, COLONIES, PROCEEDINGS OF THE TENTH INTERNATIONAL STUDIES CONFERENCE, PARIS, JUNE 28TH–JULY 3RD, 1937* (1938).

<sup>5</sup> Paragraph 1 of Article 8 reads: "The Members of the League recognize that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the *enforcement by common action of international obligations*" (emphasis added). As will be seen from the text, the underscored words define the concept of collective security.

essary minimum of troops, but also by the co-operation of all the nations, by a vast organisation for peace.

Such is the meaning of the Covenant, which, while providing for reduction of armaments properly so called, recognises at the same time the need of *common action*, by all the Members of the League, with a view to compelling a possible disturber of the peace to respect his *international obligations*.

Thus, in this first paragraph of Article 8, which is so short but so pregnant, mention is made of all the problems which have engaged the attention of our predecessors and ourselves and which the present Assembly has specially instructed us to solve, the problems of *collective security* and the *reduction of armaments*.<sup>6</sup>

In his paper on *Germany and the League of Nations*, Christoph M. Kimmich provides a short overview of Germany's policy toward and in the League. In general, Germans and their Government regarded the League as an instrument for enforcing the "Diktat" of Versailles. However, after a brief period of fulfillment under Stresemann, Germany was primarily interested in using the League in order to revise the Versailles Treaty of Peace. In the Locarno Agreements of 1925, Germany accepted the 1919 settlement as it related to France and Belgium under an Anglo-Italian guarantee. Germany was successful, as Kimmich points out, in using the League to enhance the protection of the German minority in Poland. Its more far-reaching revisionist claims as to disarmament and the Rhineland remained unsatisfied. After Hitler came to power, Germany denounced the unilateral disarmament provisions of the Versailles Treaty in 1935 and occupied the Rhineland in violation of both the "imposed" Versailles Treaty and the "voluntary" Locarno Agreements in 1936, after the League had demonstrated its impotence in preventing Italy's conquest of Ethiopia.

It may be of interest to note that Kimmich does not mention the Tripartite Alliance of 1919 between the United States, France and Great Britain, which was intended to guarantee French security pending the establishment of an effective system of collective security as envisaged in the Covenant of the League.<sup>7</sup> The Anglo-Italian guarantee in the Locarno Pact of 1925 was an illusory substitute for the Anglo-American guarantee.

<sup>6</sup> LEAGUE OF NATIONS O.J. Spec. Supp. 24, Annex 16, at 117, 118 (1924) (italics in original). The Rapporteurs conclude: "Thus, after five years' hard work, we have decided to propose to the Members of the League *the present system of arbitration, security and reduction of armaments*—a system which we regard as being complete and sound" (*id.* at 119, italics in original).

<sup>7</sup> It is, however, mentioned by Maurice Vaïsse on p. 246 of his essay, *La Société des Nations et le désarmement*. He makes the point:

How can one conceive a scheme for disarmament without American participation? In the first place, France is deprived of the security guarantee which Wilson and Lloyd George promised to Clemenceau as a substitute for the French claim to establish a Rhine state. As a consequence of the Anglo-Saxon defection, France finds itself in the paradoxical position of a victor who lives in fear of the vanquished. In the absence of Anglo-American assistance, France makes disarmament dependent on guarantees of its security [reviewer's translation].

Gary B. Ostrower provides a useful analysis of the vacillations in U.S. policy towards, and relations with, the League under the administrations of Wilson, Harding, Coolidge, Hoover and Roosevelt. The United States participated actively in the so-called nonpolitical activities of the League. In the 1920s, it appointed a consular official in Geneva to report on League developments. However, an attempt during the Roosevelt administration to replace the consul with an ambassador had to be abandoned owing to a strong negative public reaction. The hope that the Kellogg-Briand Pact of 1928 would become a bridge between Washington and Geneva never materialized, although it was useful in promoting a degree of collaboration in the Manchurian and Ethiopian crises. The United States joined the International Labour Organisation in 1934, but efforts to bring the country into the Permanent Court of International Justice came to naught when the Senate refused to consent to the ratification of the 1929 Protocol to the Court's Statute.

It may well be, as Ostrower argues, that "[d]uring the Manchurian affair, Hoover and Stimson had unintentionally undermined collective security" (p. 137). But it is also doubtful whether the United States was economically and militarily in a position to take strong action, with or without Great Britain, against Japan. The Stimson doctrine of nonrecognition was barely a face-saving device. In the case of the Ethiopian crisis, stronger economic and financial measures, if applied over a longer period, might have been more effective. But in this case both France and Great Britain had other objectives in mind than the defeat of Italy, a potential ally against German aggression. The Hoare-Laval Plan was a better indication of the policy pursued by those great powers than was the speech delivered by Sir Samuel Hoare in the Assembly of the League on September 11, 1935.<sup>8</sup> In this crisis, it is quite possible that public opinion in the United States might have induced the Roosevelt administration to adopt a prosanctions policy if Britain and France had taken a determined lead. What is certain is that the weakness of will and military power shown by the democracies fueled, as noted earlier, the aggressive designs of Hitler Germany.

The role of the Soviet Union in the League is treated at some length and sympathetically by Ingeborg Plettenberg (pp. 144–81), from its admission in 1934 to its expulsion in 1939. Generally supporting the collective security principles of the League, the Soviet Union looked upon them as offering a framework for organizing a "peace front" against fascist aggression. When in the wake of the Ethiopian crisis the League undertook an examination of the validity of the principles on which it was based, the Soviet delegate,

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Vaïsse, however, is wrong in speaking of "Anglo-Saxon defection." Britain ratified the treaty, but its entry into force was dependent upon American ratification, which, in turn, was dependent upon American membership in the League—which was not forthcoming. See Art. 2, 225 CONSOLIDATED TREATY SERIES 425–27 (C. Parry ed. 1969).

<sup>8</sup> Ostrower writes that it was, "superficially, one of the more rousing speeches in support of collective security ever made by a representative of a Great Power" and that it "electrified" the League (p. 136). I happened to be in the audience and can testify to its electrifying impact in the crowded auditorium.



Three essays are devoted to Switzerland's relations with the League: one, of a general character by Roland Ruffieux (in French); one on Switzerland and "Radio Nations" by Antoine Fleury (in French); and a third on *William E. Rappard and the League of Nations* by Ania Peter. Recognition of the neutrality of Switzerland was a precondition for its membership in the League. The Council, in a resolution on February 13, 1920, agreed that Switzerland would cooperate in economic and financial measures pursuant to Article 16(1) of the Covenant but would not participate in military action or allow passage of foreign troops through, or the preparation of military operations in, its territory. There is much in this essay by Ruffieux about Swiss internal politics. More directly relevant was the Swiss policy during the Ethiopian crisis. Switzerland tried to apply some economic measures but was very much concerned not to antagonize Mussolini. The Federal Council refused to allow the Emperor of Ethiopia to establish himself in Switzerland and extended early recognition *de jure* to Italy's annexation of Ethiopia in December 1936 (p. 187).<sup>11</sup> For Switzerland the principal benefit of membership in the League seems to have been that it helped to mitigate the isolation imposed by its neutrality and to create the habit of seeing problems in their European and even universal perspective (p. 192).

The story of "Radio Nations" told by Antoine Fleury fits well into the pattern of Swiss policy toward the League: to derive as much profit as possible and minimize the risks to its neutrality. After protracted negotiations, an agreement for the League radio station was signed on May 21, 1930, for a period of 10 years. The return of Switzerland to integral neutrality was

<sup>11</sup> According to J. H. SPENCER, *ETHIOPIA AT BAY* (1984), when the Emperor and his delegation arrived in Geneva to defend his cause in the Assembly, they had to stay in a hotel,

although the Emperor had a private villa in nearby Vevey. The Swiss government, faithful to its fierce anti-Ethiopian prejudices, refused to allow him to occupy his villa even for the short period of the special session of the Assembly. The pretext was that he could not do so without undertaking to abstain from political activities—a requirement which if consistently applied would have closed down the Assembly of the League [p. 72].

Another example of concern for neutrality and objectivity related to the (Swiss) International Committee of the Red Cross (ICRC). When Italy used poison gas, Ethiopia asked the ICRC to appeal to national Red Cross societies for gas masks.

This request was turned down by the IRCC [(ICRC); Spencer refers to it as the International Red Cross Committee (IRCC)]. In attempting to justify this outrageous and highly partisan refusal, the IRCC argued that it could not forward a general appeal for gas masks "without specifying for what purposes the masks were to be used." The committee neglected to indicate to what other conceivable use they might be put [p. 50].

When the Committee of Thirteen of the League called upon the ICRC to supply "such information as it had in its possession as might throw light on the [Ethiopian] accusations . . . [t]he IRCC declined the request, alleging that the 'neutrality which the International Red Cross Committee is bound to observe makes it necessary for the Committee to exercise very great discretion' " (*id.*). Spencer adds that the President of the Committee was Max Huber,

a particularly prominent international lawyer. He had served as judge on the Permanent Court of International Justice, and for three years was its president as well. By his signature on this disgraceful and futile attempt to cover up an international crime which, by then, had become widely known and which was never denied by Italy, he prostituted his own reputation and that of international law to the call of political convenience [*id.*].

recognized by the League Council on May 14, 1938, and on September 4, 1939, the League Secretariat agreed to send no propaganda "over its station" in order to avoid offending Italy or Germany and tensions with the Swiss Government (pp. 213, 215). The attitude of Switzerland with respect to the League is best summed up by Fleury:

The matter of "Radio-Nations" and the attitude of Swiss authorities relating to it reflect fairly the evolution of Swiss policy toward the League of Nations. In the beginning and as long as there were no risks, as long as there even was prestige to be gained, Switzerland was available, but then followed a gradual abandonment which without overt articulation was expressed with sufficient clarity by technical and particularly demeaning measures (such as the refusal to receive the successor of Avenol in Berne; refusal, since 1941, to pay its assessed contributions, control of telegrams and telephones, etc.), measures designed to make clear to the international authorities in Geneva that the League of Nations was no longer relevant [p. 216, reviewer's trans.].

Ania Peter contributed a well-deserved tribute to William E. Rappard, who with Paul Mantoux in 1928 founded the Graduate Institute of International Studies, the first institution devoted to the study of international relations, an institution that has continued to grow and expand under their successors. Its international reputation is well deserved. Rappard was a strong believer in an active Secretariat which, at its beginning, in addition to Rappard and Mantoux, included Salvador de Madariaga, Jean Monnet, Ludwik Rajchman and Sir Arthur Salter. It would be tedious to review the many activities of Rappard as a practical politician, scholar and teacher. Suffice it to mention some of his views on international organizations, which are still relevant today.

While a strong believer in democracy, Rappard

warned against the pseudo-democratic "one-man-one-vote" formula. Was it acceptable if a majority of small States imposed their will upon the Great Powers whose contributions financed the major part of the international organization? Would not the Great Powers . . . turn away from a game whose rules were determined by others, but for which they paid the stakes [pp. 232-33]?

He favored the system of weighted voting adopted in the International Monetary Fund, which provided a balance between contributions and powers (p. 233). Rappard, states Peter, "had coined the phrase 'Three Leagues in One' and defined these Leagues as follows: the execution of the Peace Treaties, the promotion of international-co-operation, and the outlawing of war" (p. 235). The most important functions were arbitration and collective security; all the others—disarmament, protection of minorities, the mandates system, technical cooperation—were important but ancillary. Peter ends on a realistic note: a world conscience "assumed by Rappard as fundamental to any international organization, no longer exists. No longer can we have confidence in the spoken or the written word, for organised lies and brutality have become socially acceptable—even in international organizations"

(pp. 235–36). Fortunately, Rappard did not live to witness this stage in the evolution of the United Nations.

Chapter III of the book contains three essays on problems of security. The lead article by Maurice Vaisse (in French) gives an excellent overview of the various steps taken by the League to implement Article 8: the reduction of armaments “to the lowest point consistent with national safety and the enforcement by common action of international obligations.” There were disagreements on the question whether security or disarmament comes first. The French Government and its allies generally supported the indirect approach: security, arbitration and disarmament. Germany, the primary revisionist power, desired equality of armaments first and foremost. The author seems to lean to the French view when he questions whether the problem of disarmament was properly formulated and, as an answer, quotes Madariaga: “In fact, the problem of disarmament is not the problem of disarmament. It really is the problem of organization of the world community (p. 258).”<sup>12</sup> And, again relying on Madariaga, he questions whether one does not invert the problem by trying to get rid of armaments without first tackling the problem of security.<sup>13</sup> There is much in this essay that has relevance for contemporary disarmament negotiations. The habit of putting the cart before the horse did not go out of fashion with the demise of the League and the establishment of the United Nations.

In an essay (in French) on regional security and the League, Constantin Svolopoulos discusses a problem that is quite familiar to the United Nations: Are regional agreements compatible with the general organization? Article 21 of the Covenant seemed to give a positive response.<sup>14</sup> Almost from the beginning, the League members attempted to strengthen the provisions of the Covenant through supplementary instruments such as the 1923 Pact of Mutual Assistance and the 1924 Geneva Protocol for the Pacific Settlement of International Disputes. Both failed. A new approach was tried in the Locarno Pact of 1925 on a regional basis. However, an Eastern Locarno did not materialize (pp. 272, 277). But a defensive alliance, the Little Entente including Yugoslavia, Rumania and Czechoslovakia, was established through bilateral treaties concluded in 1920–1921. In 1934 a Balkan Entente was put together by Rumania, Greece, Turkey and Yugoslavia, and in the same year a Baltic League was concluded by Lithuania, Latvia and Estonia (p. 275). In the struggle between “indispensable unitarism” and “inevitable decentralization,” the latter seems to have prevailed. The author concludes that one should not close one’s eyes to the fact that “in the absence of machinery capable of ensuring peace on a universal plane, regional tendencies

<sup>12</sup> The quotation is from SALVADOR DE MADARIAGA, *DISARMAMENT* 48 (1929).

<sup>13</sup> In a footnote, the author quotes from Madariaga’s *MORNING WITHOUT NOON* 31 (1973): “Let fear of war vanish and armaments will soon be discarded. No one goes about with a revolver in his pocket in the streets of Geneva, but one does sometimes in Shanghai or in Chicago.” No doubt, were Madariaga writing today, he would have selected other cities.

<sup>14</sup> Article 21 reads: “Nothing in this Covenant will be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace.”

insofar as they submitted themselves to the international order and proclaimed their sincere attachment to the League of Nations, offered an alternative which, if adopted generally . . . could have made a positive contribution to peace" (pp. 277-78). However, in fact, regionalism did not fare better than the League. The League might have survived the Manchurian crisis, but the League's failure in the Ethiopian crisis was followed almost immediately by the occupation of the Rhineland and the spectacular collapse of the much vaunted Locarno Pact. The occupation of Austria and Czechoslovakia without a murmur from the League or regional groups did the rest.

The contrast between the success of the League in the Leticia conflict between Colombia and Peru (1933-1934) and its failure in the Ethiopian crisis is the topic of an essay by George W. Baer. In the Leticia conflict, as in the 1925 Greco-Bulgarian frontier incident, the League functioned well. The territory known as the Leticia Trapezium was assigned to Colombia by a treaty of 1922. Hostilities were initiated in 1933 by Peru, and Colombia appealed to the League in February 1933. The Council on March 28, 1933 adopted a report pursuant to Article 15(4) of the Covenant. Brazil and the United States, both nonmembers of the League, supported a peaceful settlement. Peru (under a new and moderate government) agreed to withdraw from the area and the League set up a "Commission for the Administration of the Territory of Leticia" for one year, which flew the League flag and commanded a number of Colombian soldiers. "The Commission, whose work was of an entirely new and unprecedented character, administered Leticia in the name of the Colombian Government from June 23rd, 1933, to June 19th, 1934."<sup>15</sup> Peru desired some revisions and an extension of time. This was opposed by both Colombia and the Council. The functions of the Commission "came to an end and the territory was handed back to the Colombian Government on June 19th, 1934, after Colombia and Peru had concluded the Agreement of Rio de Janeiro (May 24th, 1934), consisting of a Protocol of Peace, Friendship and Co-operation, together with an Additional Act."<sup>16</sup> Baer gives credit for the peaceful settlement to the firm attitude of the Council, Brazilian and American encouragement and, finally, the restraint of both Peru and Colombia.

All these elements were missing in the Ethiopian crisis. The intransigent stand of Italy, Ethiopia's weakness, British and French concerns about Italy's support in case of a conflict with Germany and fear of Bolshevism in Italy in case of defeat militated against a successful League intervention. Sanctions were tried but, contrary to Article 16(1) of the Covenant, in a gradual fashion and for too short a time. Also, the military defeat of Ethiopia came sooner than was expected in some quarters. The political framework of the two conflicts was, of course, entirely different. No great-power interests were involved in Leticia; they were dominant in Ethiopia. In Baer's view, appeasement worked and

<sup>15</sup> ESSENTIAL FACTS ABOUT THE LEAGUE OF NATIONS 176 (1938).

<sup>16</sup> *Id.*

there seemed no further use for the Covenant. A realistic response to the incoherence and instability of international affairs lay, it seemed, in new, particular accommodations, and preparations for war. States drifted apart, into neutralism, ad hoc connections, and rearmament. After 1936 statecraft reverted to the enduring principle of international disorder: save oneself and the devil take the hindmost. Indeed, statesmen had never given up this principle. That, for a history of the League, is one lesson of the Ethiopian affair [p. 289].

Another lesson, of course, was the fearful price that the states, particularly Britain and France, paid for the desertion of the League.

The last chapter is devoted to several aspects of what Rappard had called one of the "three Leagues": the promotion of international cooperation as provided in Article 23(e) of the Covenant. A. Alexander Menzies gives a very informative description of the activities of the League from the 1920 Brussels Financial Conference to the 1928 Statistics Conference, of the League Economic and Financial Committee and the corresponding section in the Secretariat. Members of the Committee served in their individual capacity, but governments usually appointed senior advisers, which ensured a "close connection between the 'political' and the 'technical' bodies" that "eased the way to international compromise and agreement" (p. 297). In addition, the work on

technical issues established broad contacts between the League and government civil services and with a wide range of international agencies. This contact was important to the whole range of the League's work as it directly involved a large number of persons who then felt that they had a personal commitment to the success of the League [p. 311].

This useful collaboration was virtually terminated by the advent of the Great Depression.

Another aspect of international cooperation is discussed by Norbert Meinenberger: the collaboration between the League and China. It started in 1929 in the field of public health, gradually expanded to include financial, economic and other problems and lasted until 1941. One of the first experts sent to China by the League was Sir Arthur Salter. In view of the technical assistance programs of the United Nations, it is interesting to read his observation after his first visit in 1931:

The indispensable basis was peace, external and internal, and a reasonably good government. Without this all financial and economic schemes were useless. And to this end the technician could contribute nothing. The first step must be political and military; economic reconstruction might then be consolidated; but it could not be initiated [p. 315].

Meinenberger stresses the role of high-ranking and other officials of the League, some 30 of them, in the reconstruction effort. "Without the initiative of Ludwik Rajchman—the head of the League's Health Organization—and the dedication of Robert Haas—the head of the League's Organization for Communications and Transit—the collaboration with China would not have

been quite so intense" (p. 317). Where are the experts of comparable stature today?

The work of the Financial Committee, one of the technical organs of the League, in the reconstruction of Austria (1921-1926) is the topic of a study (in French) by Nicole Piétri. It is an impressive example of the collaboration between members of the Secretariat and well-known experts from several members, particularly Great Britain. The situation in Austria after World War I, as this writer can testify from his own experience, seemed pretty hopeless. But the control commission, set up by the League under the draconian leadership of a Dutch national, Zimmerman, succeeded in placing Austria's economy on a reasonably stable basis. The desire of a significant segment of the population for union with democratic Germany never completely disappeared, as was shown by the Austro-German protocol for a customs union of March 19, 1931; because of the opposition of Britain and France in particular, it did not materialize.<sup>17</sup>

The Financial Committee of the League tried to demonstrate that "contrary to the advocates of a union with Germany, Austria was viable and the future, after World War II, showed that it was right" (p. 340).

A somewhat technical paper on the International Economic Conference of 1927 (in French) by Jean Halperin deals with a more general effort by the League to cope with the economic difficulties of the post-World War I era. The conference was well prepared by members of the Secretariat and outside experts and its goal was to lay the foundation for what is now called in the United Nations the "New International Economic Order." Fifty states including three nonmembers of the League (the United States, the Soviet Union and Turkey), 194 delegates and 226 experts participated, but only Austria seated a woman on its delegation (p. 354). Then as now, one of the main issues faced by the conference was how to reconcile free enterprise and state-directed economic systems, and how to ensure economic and social equality between advanced and emergent nations (p. 348).

Atle Grahl-Madsen contributed a concise and informative paper on *The League of Nations and the Refugees*. The humanitarian work in this field was started by the League Council in 1921 when a Conference on the Question of Russian Refugees was convened in Geneva and Fridtjof Nansen was appointed High Commissioner for Refugees. The concern of the League was progressively extended to refugees from other countries and in 1933 the Office of the High Commissioner for Refugees coming from Germany was established. Summing up, the author refers to the work of Sir John Hope Simpson:<sup>18</sup>

[I]f the official involvement of the League was half-hearted, the selfless enthusiasm and compassion of certain individuals in leading positions turned the operation into one of importance and consequence . . . not only for the hundreds of thousands of fellow men, women, and

<sup>17</sup> See Customs Régime between Austria and Germany, 1931 PCIJ, ser. A/B, No. 41 and literature cited on p. 712 of 2 WORLD COURT REPORTS (M. O. Hudson ed. 1931).

<sup>18</sup> THE REFUGEE PROBLEM: REPORT OF A SURVEY (1939) (no page given).

children directly affected, but also for posterity, since the endeavour created an international humanitarian model of proven worth [p. 366].

However, the dimension of the refugee problem facing the United Nations made a different structure necessary.

The system for the protection of minorities initiated by the treaty of June 28, 1919 between Poland and the Principal Allied and Associated Powers became one of the major experiments undertaken by the League. Richard Veatch traces its evolution from the League Council resolution of February 13, 1920, which placed the treaty under the guarantee of the League, to the final meeting of the Council in December 1939 (p. 369). In a subsequent resolution, the Council adopted the necessary procedural rules and recognized the right of petition of members of minorities. By 1924 13 states in eastern and central Europe had accepted instruments for the protection of minorities. Upon achieving independence, Iraq joined the system in 1932. A separate system was established in Upper Silesia, in both the German and Polish parts. Veatch provides an excellent analysis of how the system worked from the initial petition through the Minorities Section of the Secretariat, to the Minorities Committee of the Council, and finally the Council itself. The Council requested four advisory opinions from the Permanent Court of International Justice. In one case—Germany against Poland—the Court gave a judgment.

Considering that the members of the League were not clear in their own minds whether the protection of minorities was to be a method for painless assimilation or a step toward eventual political union with a neighboring "mother" country, the author gives a guarded response to the question whether the system failed. While it did not abolish the old antagonisms between eastern European ethnic groups, the political exploitation of minorities intensified after its demise in the 1930s. It provided remedial action in many cases such as compensation or better compensation for expropriated property and withdrawal of restrictions on minority educational and religious activity.

Humanitarian achievements of this sort were in themselves no small accomplishment in the eastern Europe of the 1920's and 1930's, and even in the absence of clear-cut and immediate political benefits, would appear more than enough to justify the minorities protection system as a useful and creative innovation in international organizational activity [p. 382].

Protection of minorities is still on the UN agenda, but in practice the main concern is with human rights.

In the final essay (in French), *The League of Nations and Colonialism: The International Mandate: An Old Idea for Tomorrow?*, Yves Collart offers some observations on the organization and operation of the Mandates system, but he is more interested in exploring the relevance of the League experience for the future of very small territories that achieved independence during the wave of decolonization under UN auspices. He regrets that students of the Mandates system were too much concerned with its legal aspects and

the mechanism of petitions and neglected their content as well as the mine of information contained in the annual reports submitted by the Mandatories. The Mandates Commission limited itself to the functions conferred upon it and was reluctant to press for the power of investigation. It never regarded itself as an instrument of decolonization. The impact of Italy's war against Ethiopia on the growth of nationalism in Africa was not examined.

Collart is anything but enthusiastic about the work of the Committee of Twenty-four, which oversees the application of General Assembly resolution 1514 (XV) of 1960, and which has pursued self-determination to the point that only a fringe of island territories, for which sovereignty is inconceivable, will be left (p. 396). Such territories are incapable of meaningful development. Micro-states are extremely susceptible to manipulation by ruthless individuals who seize the levers of government and introduce legislation concerning land distribution and other matters, including procedures for "lightning divorces" (pp. 398-99). The question then is: "How to protect the small island states against the new breed of conquerors ('conquistadors')" (p. 399). The Mandates system cannot be revived.

But the idea of Mandates has the invaluable merit—which it shares, for example, with the federal system—of being a *principle* which lends itself, provided its limitations are kept in mind, to many varying uses. It is certainly possible to imagine similar approaches . . . which would provide to micro-territories a degree of protection, a framework and an assistance without which they really have no future [p. 399].

This is certainly an interesting idea but quite "unrealistic" in the climate that has come to prevail in the United Nations.

This collection of essays on some of the functions and activities of the League should be of great interest to students of international relations and of the relatively new field of the history and evolution of international organizations.<sup>19</sup> The League of Nations failed or, perhaps more precisely, the nations failed the League. However, the idea of collective security survived World War II and was incorporated in a more "realistic" version in the UN Charter, though one may question the extent to which it has been reflected in practice. As Zara Steiner says somewhat defensively in the introductory essay:

Some of the paths followed by the League proved to be dead ends, and dangerous dead ends at that. Even the study of dead ends has its utility. The failures of history often are the most instructive. But it is not popular among historians to argue in favour of the study of lost causes [p. 14].

This may be so for historians, but for students of international organization a better and more accurate understanding of the League seems to this reviewer to be indispensable for the study of both the Charter and the practice of the United Nations and its specialized agencies.

<sup>19</sup> For a guide to the voluminous literature on the League, see BIBLIOGRAPHICAL HANDBOOK OF THE LEAGUE OF NATIONS (Victor-Yves Ghebali, prov. ed. 1980).



If the length of this review needs an apology or explanation, it simply is that the League and specifically its organization for intellectual cooperation were part of the life and professional experience of the reviewer.

LEO GROSS  
*Board of Editors*

*Consensus and Confrontation: The United States and the Law of the Sea Convention.*

Edited by Jon M. Van Dyke: Honolulu: The Law of the Sea Institute, University of Hawaii, 1985. Pp. x, 576. Index. \$29.50.

Why did the United States abstain from signing the 1982 Law of the Sea (LOS) Convention and did it err in its decision not to do so? What are the likely consequences of this decision over the coming years? These and related questions are the theme of this comprehensive and informative book, which represents the proceedings of a workshop held in Honolulu in January 1984 under the auspices of the Law of the Sea Institute. The text has been carefully edited and substantially footnoted; it reflects the opinions of the nearly 30 international experts who participated. *Consensus and Confrontation*, consisting of 28 papers and interspersed with verbatim records of discussions, is an important contribution to the law of the sea literature, not only because of the insights it provides into various perspectives on the LOS Convention but also because of the legal and historical data it contains on topics covered by the Convention.

The text starts with an overview of the current status of the Convention, and addresses a number of issues, such as: (1) Was the LOS Convention negotiated as one "package deal" or as a series of "mini-packages"? (2) What is the status of "customary international law," and can it provide the certainty needed to govern such actions as the passage of warships through straits or the allocation of fishing resources among competing nations? and (3) What will become of the sophisticated dispute resolution procedures developed in the Convention? The discussion of these matters pitted two U.S. State Department lawyers, David Colson and Brian Hoyle, against an array of pro-Convention experts, including, among others, Satya Nandan of Fiji, Hasjim Djalal of Indonesia and Tommy Koh of Singapore.

The next chapter concerns the status of customary international law and the LOS Convention, and here the Soviets Anatoly Kolodkin and Anatoly Zakharov join other participants in their critical views on the U.S. decision not to sign. There is a detailed history of evolving U.S. policies toward the LOS Convention and a discussion of the relationships between customary international law and the law of the sea. Bernard Oxman contributed a paper in which he concludes that the rights enjoyed by coastal states in their exclusive economic zones reflect customary international law but that it is foolhardy to expect that all of the restraints on coastal state action, as spelled out in the Convention, will necessarily prevail, since the Convention will probably not be widely ratified. Also in this chapter, Paul Yuan reports that decisions of international courts are generally regarded in China "as being

the result of manipulations by major capitalist powers," and that China has adopted a "pick and choose" attitude toward both ICJ decisions and the LOS Convention itself.

There then follow chapters on deep seabed mining, freedom of navigation, fishing issues, marine environmental protection and enforcement and dispute resolution. In these, the two State Department defenders of the U.S. action are joined by only one other participant, Conrad Welling, longtime spokesman of the U.S. ocean mining industry, who holds that, given the regulatory burdens placed upon the seabed mining industry by the Convention, there will be a shortage of risk capital available for development in countries that are party to the treaty. Ranged against these three are such formidable opponents as R. P. Anand, Ved Nanda, Jorge Vargas, Choon-ho Park and Elisabeth Mann Borgese.

In the material on freedom of navigation, there is a discussion of the Malacca and Singapore Straits, as well as of archipelagic sea lanes in Indonesia. Here, Ambassador Djalal reports that Indonesia will not grant non-signatories to the Convention the right of transit passage through its sea lanes, a move that could have serious repercussions in the United States. Under fishing issues, William Burke discusses the fishing practices of non-signatory states. He feels that although the major provisions of the Convention conferring sovereign rights on coastal states "are commonly found in state practice and therefore reflect customary law . . . the accompanying details are not yet customary law." This fact can affect such issues as the determination of allowable catch within an economic zone (EEZ) or a state's harvesting capacity, endangerment of a target species, or coastal state interests concerning highly migratory species or straddling stocks. Considerable attention is paid in this part of the book to the U.S. position on tuna within the EEZ, particularly its potential effect on the interests of Pacific island nations.

The final chapter, "The Costs and Benefits of Not Joining the Convention," contains predictable summaries of various participants' positions on the U.S. action and its consequences. David Colson notes that a benefit to the United States of not signing is the opportunity to develop an alternative seabed mining regime, but he concedes that one cost is a greater degree of uncertainty over the navigation and overflight provisions. Colson also regrets the U.S. inability to make use of the dispute settlement provisions of the Convention. Hasjim Djalal argues that by failing to sign, the United States places heavy strains on bilateral relationships with its allies. Here and in other parts of the text it is alleged that the United States acted in bad faith by not signing and has thereby damaged its international credibility.

One troublesome feature of *Consensus and Confrontation* is the apparent bias of its editor against the U.S. decision not to sign. This is evident in the thrust of the editor's summaries of papers and discussions at the beginning of each chapter and in his choice of the nine "Conclusions" appended to the last chapter, most focusing on negative aspects of the U.S. position. There were certainly other conclusions that might also have been gleaned from the workshop discussions, one of them being that the ultimate success

or failure of the Convention will depend to a large extent on what the parties to it succeed in working out in the ongoing negotiations of the Preparatory Commission—a problem that can only indirectly be linked to the recalcitrance of the United States. But, this criticism aside, the fact is that the workshop organizers brought together many of the most knowledgeable and experienced actors in the long LOS Convention process, allowed them freely to exchange information and ideas in a relaxed atmosphere and, through the proceedings, carefully reproduced their contributions to what is still very much a dynamic and evolving international process.

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*Hanging Together: The Seven-Power Summits.* By Robert D. Putnam and Nicholas Bayne. Cambridge: Harvard University Press, 1984. Pp. x, 262. Index. \$17.50.

The summit meetings among the heads of government of the principal Western countries, which have been held annually since 1975, have become an important feature of contemporary international affairs. Although they have attracted considerable journalistic comment, this book is the first detailed scholarly study of their origins, procedures, evolution and consequences. It is an important contribution that fills a significant gap.

The book is the product of an unusual collaboration between a U.S. political scientist, Robert D. Putnam, who teaches at Harvard, and a British diplomat, Nicholas Bayne; Putnam wrote 6 of the 13 chapters and Bayne, 7. Despite this division of labor, the book is intellectually and stylistically unified. Because of the collaboration, the account of the summits is both analytical and verisimilar. The collaboration produced a book that is much more than a summary of current history, but one that contains very little jargon.

The analysis is based on published reports, unpublished material, accounts from the press in all seven countries involved in the meetings and interviews with more than three hundred participants and close observers. Because of the thoroughness with which the authors probed these sources, little is likely to be added to their account of the summit meetings as important international events, from the first at Rambouillet in 1975 through the ninth at Williamsburg in 1983, until the internal documents of the governments of the participating countries are published.

President Valéry Giscard d'Estaing of France initiated the summits by preparing the way and issuing the invitations for the Rambouillet meeting. Putnam and Bayne identify the deeper origins of the summits, however, as: "(1) the increasing entanglement of foreign and domestic politics that flows from economic interdependence; (2) the waning of the US hegemony that had undergirded the long period of postwar prosperity; and (3) the bureaucratization of international relations, a trend that some political leaders found particularly frustrating" (p. 1).



In their original conception, the summit meetings were to be small, informal, personal gatherings of the heads of government of the Federal Republic of Germany, France, Japan, the United Kingdom and the United States. Even before the first meeting, this core group was expanded to include the Italian Prime Minister. The Canadian Prime Minister and the President of the Commission of the European Communities were added at the second and third meetings, respectively. The changes in the summits, though, went beyond their composition. The authors show how the Carter administration's attempt to implement the trilateralist prescription for global management accelerated and forced an inevitable trend toward increasing institutionalization of the proceedings. They then show how the disappointing results of attempts at international demand management, the replacement of Keynesian with monetarist policies, the coming to power of more conservative and more domestically oriented governments, and the innate antipathy of some leaders to giving their power to bureaucracies, as institutionalization inevitably did, combined to reverse this trend.

The book also covers in considerable detail the substantive issues dealt with in the summit meetings. It outlines the main economic and political issues at stake and explains the reasons for the increasing emphasis given to the latter category. It places the discussions and decisions at the summits in the context of the consideration of the same issues in other settings, especially the major international institutions.

The authors believe that if the international economy is to remain relatively open, some degree of coordination among the principal Western economies is essential. According to their analysis, summit meetings have unique advantages as instruments for achieving this. They bring together the heads of government of the seven economically most important "Western" countries, individuals whose authority transcends departmental boundaries and who uniquely have responsibility for both the domestic and the international affairs of their countries.

The logic of their argument is impeccable, and their analysis clearly shows the strengths and limitations of the summits. It thus provides indications of what summits might and might not be expected to accomplish.

In the final chapter, looking toward the future, Bayne suggests that coming summits might add structural adaptation to the list of issues previously considered. Ironically, the book provides little indication of how successful summits might be if they formally addressed this issue. Although the authors are acutely conscious that interdependence involves meshing domestic economic and political dynamics, their analysis does not delve very deeply into either the domestic factors influencing positions taken at the summits by the participating countries or the domestic consequences of shifts in policy that summits played some part in producing. Structural adjustment would require that the leaders consider and discuss their domestic constituencies even more than the issues previously addressed. One wishes that the authors had followed their own understanding of interdependence further; it would have given a richer analysis of the past as well as a better guide to the future.

This criticism notwithstanding, Putnam and Bayne have produced an ex-

cellent book, one that all who are interested in the international affairs of the past decade or in the evolution of international institutions and the international political economy must read.

HAROLD K. JACOBSON  
*Board of Editors*

*The Falklands War: Lessons for Strategy, Diplomacy and International Law.* Edited by Alberto R. Coll and Anthony C. Arend. Boston: George Allen & Unwin, 1985. Pp. xiv, 252. Index. \$27.50, cloth; \$12.50, paper.

This book originated in a symposium held on the Falklands war at the University of Virginia School of Law in the fall of 1982, shortly after the shooting in the South Atlantic between the British and Argentines had ended. The list of contributors reads like a *Who's Who* of international lawyers and theorists, among them Thomas Franck, Monroe Leigh, Alfred Rubin, Howard Levie and Inis Claude. Also providing valuable insights into the war are several U.S. Government officials who were involved in the conflict, namely, David Gompert, Douglas Kinney, David Colson and Dov Zakheim. Indeed, while most of the contributors are lawyers by training, they offer on balance a multidisciplinary approach that helps to place the myriad political, diplomatic, strategic and legal issues raised by the war into perspective.

The book is divided into three parts, although certain common themes and issues run throughout. Part 1 addresses the war's challenges to international law and contains the most provocative essays. Alfred Rubin puts the war into its historical context and outlines the applicable international law. Thomas Franck, in a most engaging and thought-provoking essay, examines the strategic role of legal principles in the conflict. He analyzes the war as a case study of how international legal principles affect the conduct of international politics, and warns how it also illustrates the dangers that arise when such principles are neglected or selectively applied. Next, Alberto Coll examines the philosophical and legal dimensions of the use of force in the war. Anthony Arend then argues that the war illustrates the failure of the international legal order in dealing with the central issues of collective security and peaceful change, and discusses the implications of this failure for the development of international law. Finally, Howard Levie examines the compliance of Great Britain and Argentina with the laws of war.

Part 2 addresses the war's challenges to diplomacy on both a bilateral and a multilateral basis. Douglas Kinney, who served as adviser on Latin American affairs to Ambassador Kirkpatrick at the United Nations during the war, provides an overview of the negotiations between Great Britain and Argentina from their beginnings in 1964 through the 1982 conflict. He also discusses the mediation efforts of Secretary of State Haig, President Belaunde-Terry of Peru, and UN Secretary-General Javier Pérez de Cuéllar. David Gompert, who was Deputy to the Under Secretary of State for Political Affairs and was personally involved in the Haig mission, analyzes the American efforts to mediate the crisis and the effect of the war on the United

States and the international community. Next, Inis Claude offers a detailed examination of the UN involvement in the war and reflects on what it revealed about the United Nations. Finally, Srilal Perera discusses the Organization of American States and the role it played.

Part 3 addresses various short-term and long-term implications of the war. The essays in this section, however, are rather wide-ranging and, as a result, this part tends to be somewhat disjointed. Dov Zakheim explores specific political and military lessons learned from the war. Christopher Joyner then focuses on the effect of the war on another British-Argentine dispute, Antarctica. David Colson, Assistant Legal Adviser for Oceans, International Environmental and Scientific Affairs at the U.S. Department of State, discusses the management of boundary disputes in situations such as the Falklands war. Next, Monroe Leigh suggests that the underlying sovereignty dispute could be resolved through the establishment by the United States and Great Britain of a jointly administered trusteeship. Alberto Coll concludes the book by drawing together various lessons that the war can teach diplomats, military planners and students of international law and politics.

This book offers a comprehensive and very digestible analysis of many of the more important issues raised by the Falklands war. Its editors have done a commendable job of bringing together a distinguished group of international lawyers, theorists and diplomats who have provided valuable insights into the conflict and its ramifications. In particular, in this reviewer's opinion, it provides the best single collection of interpretive essays on the war from an international legal point of view yet available.

Perhaps the strongest theme to emerge is that legal principles *can* influence the outcome of international disputes. The Falklands war vividly demonstrates that principles of international law can embolden members of the international community to overcome their self-interest and directly affect strategic outcomes. Many nations, particularly the Third World bloc, that might otherwise have been expected at least not to oppose Argentina's actions in fact did so because they perceived that certain basic principles of the international system had been inexcusably breached. These nations rallied against Argentina because of a belief that, in the astute words of the British historian Hugh Trevor-Roper, "If Argentina had kept its spoil today, the rule of law would have been replaced by that of force, and no undefended island would have been secure."<sup>1</sup>

However, as Professor Franck eloquently observes in his essay, when international legal principles are violated with impunity, they lose their influence and ability to affect strategic outcomes. The long list of unanswered violations of, and confusion surrounding, principles such as those contained in Article 2(4) of the UN Charter rendered these principles impotent in deterring Argentina. In other words, a nation, such as Argentina, that regularly observes other nations successfully violating these principles will not

<sup>1</sup> Trevor-Roper, *It's 1770. There's a Falkland Crisis*, N.Y. Times, May 29, 1982, at 23, col. 2.

accord them much weight in determining its own strategic conduct. Moreover, in such a situation it may be inappropriate for a nation, such as Great Britain, to justify its response on the ground of these incapacitated principles. Thus, the Falklands war may illustrate a selective application of certain emasculated legal principles and raises the question whether the war may be justified as a defense of "international law." At the very least, the war may indicate that nations are really manipulated, not inspired, by appeals to such principles.

This book will be best used by students of international law and politics who want a general overview of the salient legal, diplomatic and strategic issues surrounding the Falklands war. Those desiring a more detailed and rigorous analysis will find it less than satisfying. Furthermore, the book does not provide a blow-by-blow account of the war itself, so those interested in such information should instead consult any one of the number of works available on this subject.

In conclusion, this book offers a balanced and incisive analysis of many of the central issues raised by the Falklands war and provides a framework for understanding similar conflicts in the future. For those interested in putting the war and its consequences into perspective, this collection provides a solid foundation.

D. S. WHITESCARVER

*Of the District of Columbia and Virginia Bars*

*Winds of History: The German Years of Lucius DuBignon Clay.* By John H. Backer. New York: Van Nostrand Reinhold Company, 1983. Pp. ix, 323. Index. \$25.50.

When a battered Germany surrendered unconditionally at the end of World War II, it was a nation of some 65 million people, impoverished, disheartened and without a government. The conquerors divided the devastated terrain into four zones of occupation. Its capital, Berlin—in the heart of the Soviet Zone—was split into four sectors and became the seat of a quadripartite administration run by the armies of the Soviet Union, the United States, Great Britain and France. The first U.S. Military Governor, General Joseph McNarney, "neither understood the problems nor cared to understand" (p. 137). American policy was carried out by his deputy, General Clay, a West Pointer trained in engineering, whose mission was to Demilitarize, De-Nazify, De-cartelize and Democratize a unified new state that would never again threaten the peace of the world. This book, by a former member of General Clay's staff, describes how during the 4 years of Clay's reign the "winds of history" changed course.

The "Morgenthau Plan" to convert Germany into a pastoral state was soon abandoned. Clay saw the need to make Germany self-sufficient, but France and Russia, which had been recent victims of Nazi barbarism, took a dim view of a rejuvenated and united *Deutschland*. Differences arose among the wartime Allies regarding economic policy, reparations and the structure

of a new German state. Recognizing that it would not be possible to create a German nation under conditions acceptable to the United States, Clay proceeded to organize Germany on a bi-zonal and then on a tri-zonal basis that excluded the Soviet Union.

By the fall of 1946, the world was put on notice that the United States intended to remain in Germany as part of a commitment to the security of Western Europe. The introduction of a new West German currency triggered the blockade of Berlin by the Soviets who argued that the West had thereby forfeited its right to remain in the Russian Zone. Clay was determined to break the blockade—by force, if necessary. The monumental airlift that he organized to feed 2½ million Berliners assured Clay of his place in history. According to the author, Clay helped pave the way for a strong West Germany to be integrated into Western Europe as a bulwark against communism.

The book portrays Clay's repeated frustrations, anger and threats to resign over feuds with the State Department and other officials who kept changing the rules of the game. The author fails to mention such important accomplishments as the programs for the restitution of properties taken from Nazi victims, Clay's affirmation of the sentences imposed by the subsequent Nuremberg war crimes tribunals conducted by General Telford Taylor and the actions to relieve the plight of displaced persons. Clay's own review of his tenure, *Decision in Germany* (1950), is a more comprehensive report.

Almost anyone who knew Lucius Clay would agree that he was "a brilliant administrator and leader, a sparking, always tuned-up dynamo" (p. 3). His stubborn military determination surely preserved West Berlin as a forward bastion of democracy. But it may be too soon to assess Clay's contribution to world peace. Forthcoming books regarding the role of Clay's successor, U.S. High Commissioner John J. McCloy, will help to round out the picture. The *Winds of History* may help to explain why, 40 years after the war, Germany remains a divided land and Berlin—scarred by a dividing wall—is still a city under "Allied" military occupation.

BENJAMIN B. FERENCZ  
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*Law and Revolution: The Formation of the Western Legal Tradition.* By Harold J. Berman. Cambridge and London: Harvard University Press, 1983. Pp. viii, 657. Index. \$32.50.

History does not start and stop at convenient dates, but there are watershed events, like the creation of an Islamic empire in the 7th century and the Protestant Reformation of the 16th century, which so radically change the way people think that historians easily recognize their importance to the evolution of human culture. These shifts in ways of thought are far more significant from the perspective of the historian of civilization than the shifts of sovereignty that occur from battles won and lost. But it is not always easy to distinguish the two, and deep knowledge and historical perspective are rare commodities. Moreover, by the time the historical perspective can be



achieved, in some cases the shift of patterns of thought has been so sweeping and the events leading to it so distant that even the most learned historians have difficulties recognizing and analyzing events that have been seminal. Events in Italy in 1075–1122 are an example. Now Harold Berman has approached those events with fresh eyes and enormous scholarship to produce a reanalysis of the roots of the Western legal tradition that will change the way historians and lawyers think. He has produced a synthesis of legal-historical scholarship equivalent to the synthesis Fernand Braudel and the Annalists have produced in the field of economic-historical scholarship. He has almost incidentally answered the question of why in the West the decline of feudalism produced capitalism and a flourishing secular society, while in Japan and Russia similar economic forces did not produce the same kind of superstructure.

The answers Berman produces rest on establishing a background of legal thought. He describes the societies and institutions creating Germanic folk law, a substantive canon law based on divine writings, and an organization conceived of as having the power to enforce the canon and noncanon divine law in some cases through religious ceremony. He shows that their ability to divide legal categories, both for purposes of legislation and enforcement, into institutions overlapping each other produced a system in tension.

The catalyst triggering what Berman calls a "revolution" in thinking was the rediscovery of Justinian's *Digest* near Bologna about 1080, which led more or less directly to the organization of a "university" at Bologna whose scholars believed the *Digest* to be the embodiment of "reason" translated into rules fit to govern all society. This rediscovery changed the rules of the game played by an energetic pope, Gregory VII, who had asserted the primacy of the church in all legal matters in 1075, but was willing to allow "secular" (i.e., temporal, limited in time by human mortality) authorities under the dominance of the church as representatives of eternity, the "spiritual" authority, to make and enforce law, each within its proper sphere. The higher law known to and administered by the church organization was asserted to limit the secular authority, but the ultimate decline of the spiritual organization left behind a state system. Imperial pretenses to universal authority could not withstand countervailing claims by rival secular rulers and a body of professional jurists whose acquaintance with Roman law and natural law theory allowed a degree of judicial independence necessary for the survival of national secular "common law" systems, a universal "law merchant" enforced by national secular officials, and other legal systems. As a result, problems of legislation and enforcement preoccupied the administrators of all the political societies of Europe; this way of thinking was radically different from the thinking prior to 1080 and had psychological effects and practical traces still evident today.<sup>1</sup>

<sup>1</sup> For example, with some amusement Berman mentions the current Western practice of refusing to execute a condemned murderer who is insane until he recovers his sanity. Clearly, no deterrent, retributive or reforming purpose is served by deferring the execution. The origin of the rule is said to lie in the church's insistence that nobody be consigned to eternal suffering until he has had the opportunity to confess his sins and take holy communion (p. 166), acts with religious effect only if undertaken or refused by a person of sound mind.

As with all new syntheses, Berman's will face criticism from established scholars so immersed in narrower studies, such as national legal histories, that the integration of the main outlines of their work into a larger pattern will seem to them to involve overgeneralities and possibly even some errors of fact. Such possible errors, as, for example, the glib reference to a supposed conversion of the Emperor Constantine in A.D. 313 (p. 167)<sup>2</sup> might be multiplied. But they seem irrelevant to the major shift in thinking demonstrated by so much evidence.

Much more doubtful is Berman's conception of "revolution," and his notion that the shift in patterns of conceptualization regarding religious, political and legal matters in the 11th and 12th centuries deserves that label in the same way he finds it applicable to five other "revolutions": the American, French, and Russian Revolutions of 1775, 1789 and 1917, the "Glorious" English Revolution of 1640-1688 and the Protestant Reformation of 1517-1555 (p. 19). It is certainly possible to argue these things, but a European scholar is likely to have found the Revolt of the United Provinces of the Netherlands in 1581-1648 to have been a far more formative experience than the English Revolution of a generation later, and whether the American Revolution involved a shift in thought patterns similar to what came out of the French and Russian Revolutions might be discussed at very great length. From a world perspective, I should have thought the Islamic sweep across the Maghreb and into Spain in the 7th century was at least as much of a "revolution" as the Protestant Reformation. And from a strictly Western legal tradition point of view, the application of corporate concepts of legal personality to great national trading enterprises beginning in the late 16th century was at least as mind-bending and as significant in its long-range implications as the more superficial, but more obvious, political impact of the four antimonarchist upheavals cited as "revolutions" by Berman. I am not sure that Berman himself would disagree with this and suspect that the analogy he draws between the "revolution" of thought in 1075-1122 and the five other "revolutions" reflects an attempt at quick recognition more than careful analysis.

The identification of the "Papal Revolution" of 1075-1122 as a major event, possibly more significant in the long run than any of the other "revolutions" briefly mentioned, and comparable to the intellectual revolution of Greece in the 5th century B.C. brilliantly summarized for purposes of this legal study by Berman (pp. 132-43), seems amply proven even if the word "revolution" and the comparisons to some other watershed shifts of thought and political organization in the Western tradition are not fully developed.

Finally, it must be said that the book is a delight to read. Berman's style is simple and flowing. Opening the book almost to any page will catch the eye and the mind. Facts are stated simply, and wherever that simplicity detracts from accuracy by overgenerality, it adds to readability. The book

<sup>2</sup> Constantine died with Christian rites in A.D. 337. Whether there was any discrete act of conversion before then is a matter of considerable conjecture by scholars. A. H. M. JONES, *CONSTANTINE AND THE CONVERSION OF EUROPE* 73 (1948, Collier Books ed. 1962). Jones says that there is "no manner of doubt" that Constantine was "in some sense converted to Christianity" in 312, not 313.

is astoundingly readable. It is also full of short and clear summaries of aspects of law in many "specialty" fields, such as the distinctions between "usury" and "interest" developed (pp. 247-50) as a mere insert to a longer discussion of the canon law of contracts as it developed from Justinian's *Digest* in the 12th and 13th centuries, and was reanalyzed in the light of ever more sophisticated reasoning and research into pre-Christian Roman and Greek writings in the 14th and 15th centuries.

In sum, this is a seminal work for scholars, pulling together an immense amount of learning in readable form and changing the way we think about our traditions. It is also a gift for lawyers generally interested in well-written legal history. Its analysis of the conceptual origins of current rules, practices and theories is full of insights and surprises.

ALFRED P. RUBIN

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*Foreign Relations of the United States, 1952-1954, Volume XIV: China and Japan.*

Part 1, Dept. of State Pub. 9410. Part 2, Dept. of State Pub. 9411.

Washington: U.S. Govt. Printing Office, 1985. Pp. xxiii, 1845. Index in part 2.

This compilation—bridging the last year of the Truman administration and the first 2 years of the Eisenhower administration—covers the period during which the Korean War came to an end (treated in greater detail in volume XV of the 1952-1954 *Foreign Relations* series),<sup>1</sup> the Cold War with China, the signing of the World War II Peace Treaty with Japan and the negotiation of Mutual Security Treaties with Nationalist China and Japan. It consists of two parts, the first of which (pp. 1-1061) deals separately with U.S. policy toward the People's Republic of China and the Republic of China and with developing U.S. relations with Nationalist China. Part 2 (pp. 1063-822) focuses entirely on U.S. policy toward and relations with Japan. The 847 documents and editorial notes contained in this volume are numbered sequentially.

The principal subjects treated in the section on the People's Republic (with which the United States had no mutual exchange of traditional resident diplomatic missions at the time) include considerations of Peking's foreign policy and military capability, its relations with India, Japan, the Soviet Union and other countries, its hostility toward the United States and the questions of possible U.S. recognition and China's representation in the United Nations. Other topics range from the treatment of Chinese overseas communities to such critical matters as imprisonment of foreign nationals (including Americans); its attack on Nationalist China's offshore islands (Matsu, Quemoy, Tach'en and others) and attempts to achieve a cease-fire; a possible attack by the Peking Government on Taiwan; the U.S. blockade, trade embargo and other sanctions employed against the People's Republic; the pos-

<sup>1</sup> Reviewed at 79 AJIL 1139-41 (1985).

sibility of the outbreak of war with the United States; the disposition of Chinese nationals in the United States; and the 1954 Geneva Conference negotiations on these and other issues (on this conference, see volume XVI of the 1952-1954 *Foreign Relations* series).<sup>2</sup>

The sections relating to the Republic of China emphasize U.S. policy and relations that, in addition to the offshore islands crisis, concern Nationalist China's military capability and strategic importance, its possible attack on the People's Republic, the commitment of the Taipei Government to consult with the United States prior to any major military offensive and the U.S. role in the defense of Nationalist China, including the negotiation of the bipartite Mutual Security Treaty (signed on December 2, 1954, which entered into force on March 3, 1955). These sections also provide documentation on such topics as U.S. economic and military assistance, the status of the Taiwanese people and negotiation by the Republic of China of its World War II peace treaty with Japan (signed in 1952).

Part 2 addresses the gamut of U.S. relations with Japan and the latter's diplomacy with the two Chinas, Korea and other Far Eastern countries. Among the matters treated are the multipartite World War II Peace Treaty with Japan (signed on September 8, 1951, which entered into force on April 28, 1952) and the separate bipartite Peace Treaty with the Republic of China, Japan's defense budget, the negotiation of a Mutual Security Treaty with the United States (signed in 1952 and superseded in 1960), the revival of formal U.S.-Japanese diplomatic relations in 1952 and the questions of Japan's reparations, treatment of war criminals, rearmament and atomic power, as well as its admission to membership in the United Nations. A good deal of space is devoted to the consummation of a bipartite Administrative Agreement to govern the stationing of U.S. forces in Japanese territory during the post-Peace Treaty period (signed on February 28 and entered into force on April 28, 1952). Attention is also paid to the status and disposition of the Bonin, Kurile and Ryuku Islands, bilateral trade, U.S. economic and military assistance, Japan's fishing dispute with Korea and the *Fukuryu Maru* incident. The latter involved U.S. responsibility for the exposure of Japanese seamen aboard the fishing vessel to radiation produced by U.S. atomic tests in the Pacific.

Aside from the many communications flowing between the Department of State and U.S. diplomatic missions abroad, in explicating the development of foreign policy, this volume provides the texts of 10 comprehensive National Intelligence Estimates and Special Estimates, commentary on some 30 National Security Council "actions" and "documents," and extracts from many informative memorandums synthesizing National Security Council discussions. In addition to the documents pertaining to the National Security Council, the Departments of State and Defense, and U.S. diplomatic missions, this compilation embodies relevant papers of such other agencies as the Joint Chiefs of Staff, the agency concerned with the Government and Relief of Occupied Areas (GAROA), the Mutual Security Agency and its successor,

<sup>2</sup> Reviewed at 76 AJIL 467-68 (1982).

the Foreign Operations Administration. For those interested in top-level diplomacy, it presents brief references to President Eisenhower's participation in the tripartite conference with British and French leaders in Bermuda in December 1953 (for more information, see *Foreign Relations, 1952-1954*, volume V, part 2, p. 1710 ff.)<sup>3</sup> and the 4-week trip of Vice President Nixon to Asia and the Middle East, which included a visit to the Republic of China, November 8-12, 1953.

The text of this volume is supplemented with several useful lists. These embrace a catalog of unpublished papers (of the Departments of State and Defense, the National Archives, the National Records Center and the files located in the Truman and Eisenhower Libraries); a list of acronyms, symbols and abbreviations employed in the documents; and a list of more than 125 persons cited, with their titles and ranks. The compilers of this anthology also supply its users with many helpful cross-referencing, descriptive and explanatory notes. Of special value is the comprehensive, 21-page, carefully prepared, double-columned index. This compilation was produced with the customary high quality of selection, organization, annotation and treatment of documentary resources to which scholars and statesmen have become accustomed, and for which they are indebted to the Office of the Historian of the Department of State.

ELMER PLISCHKE

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*Outer Space: New Challenges to Law and Policy.* By J. E. S. Fawcett. Oxford: Clarendon Press; New York: Oxford University Press, 1984. Pp. vi, 169. Index. \$24.95.

J. E. S. Fawcett's book, *Outer Space*, attempts to cram much heady information into 122 pages and, at the same time, describe the riveting complexities of present-day outer space technology and national and international politico-legal concepts. In general, the book's objectives have been met. The sections dealing with "internationalization," "commercialization" and "militarization" of outer space are well developed and well researched. Lawyers should find the detailed discussion of the role of private enterprises in the telecommunication satellite field particularly appropriate, considering the expanding activities of enterprises such as Satellite Business Systems in the United States, British Aerospace in the United Kingdom and OTRAG in West Germany. The section on "Regulation of telecommunications" quite rightly devotes some space to a comparison between the INTELSAT and the GATT approach to regulations. The analyses of the various outer space conventions and related conventions such as the INMARSAT, Law of the Sea and Chicago Conventions and certain domestic acts demonstrate sound scholarship. Again, lawyers should find the section dealing with the legal

<sup>3</sup> Reviewed at 78 AJIL 1025-29 (1984).

and political aspects of data bank storage and communication by means of Earth satellites tantalizing. The section on remote-sensing operations is equally interesting.

Throughout the book, intriguing questions are raised, such as: Does the state or entity responsible for displacing or removing minerals from the moon retain ownership of them? Is it realistic to expect the establishment of an international authority to govern the exploitation of natural resources on the moon as contemplated by the Moon Agreement? What impact will the U.S. policy on opening up competition among satellite communication services have on the INTELSAT consortium and COMSAT? What will the future role of the INTERSPUTNIK system be, considering that the Soviets are reportedly no longer opposing the management concept and the commercial objectives of INTELSAT?

However, the book has some flaws. The flat assertion in the context of tracing the history of the concepts of "province of mankind" and "common heritage of mankind" that they "surely have biological roots" is unsupported by scientific evidence.<sup>1</sup> The discussion of the Outer Space Treaty, the Liability Convention and the Convention on Rescue of Astronauts and Return of Space Objects would have been enriched by references to portions of their negotiating history dealing with the capping of damage awards, the nature and extent of rescue efforts expected to be made by the signatories, and the use of military personnel in outer space activities. Any reference to the Moon Agreement as a draft is misleading in the absence of a notation that the Agreement has entered into force, having been ratified in accordance with Article 19. The text of the Convention on Registration of Objects launched into Outer Space, set forth in Appendix B, is defective since Article XI is omitted. Certain statutes discussed at length in the book are identified by their popular name only. For ease of finding their texts, the public law number and the title in the U.S. Code and section numbers should have been specified.<sup>2</sup> The reference to the "US Space Industrialization Act (1978)," without any further identification, is unhelpful.

The foregoing comments should not detract from the book's value as an instructive primer on the politico-legal aspects of outer space activities. In sum, technical terms and concepts are explained in a lucid fashion; legal and policy ideas are well developed; the analyses of the legal material are sound. The reader will be impressed by the fascinating world of outer space and the rapid development of technology brought about by human ingenuity. At the same time, the reader will be left to ponder over the erosion of traditional concepts of law caused by outer space operations. Indeed, remote-sensing systems and satellites alone—with their eyes, ears, voices—are creating a world without borders. Concepts such as state jurisdiction and sov-

<sup>1</sup> Professor C. D. Darlington, in his authoritative treatise on *The Evolution of Man and Society* (1969), discussing the customs and morals of paleolithic man, states at p. 62: "All probably have a sense of territory. None have acquired a sense of other kinds of property and it is in this respect that they come into grievous conflict with more advanced peoples."

<sup>2</sup> NASA Act, Pub. L. No. 85-568, 72 Stat. 426 (1958), 42 U.S.C. §2451 *et seq.* (1982); COMSAT Act, Pub. L. No. 87-624, 76 Stat. 423 (1962), 47 U.S.C. §731 *et seq.* (1982).

foreign and proprietary rights may well require significant changes in order to be responsive to the needs of outer space activities. This message is conveyed with clarity in Professor Fawcett's book. The book will make a useful addition to the library of any lawyer with an interest in outer space.

CHARLES L. KENT

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*Barrister-at-Law, Lincoln's Inn*

*The Choice of Law. Selected Essays, 1933-1983.* By David F. Cavers. Durham: Duke University Press, 1985. Pp. xv, 427. Index. \$45.

This book should prove of great value to all persons interested in conflict of laws. It contains the majority of the essays on this subject that were written by the author over a 50-year span. Ever since the publication of the first essay in 1933, Cavers has been recognized as one of the most creative and innovative thinkers in the field. Indeed, it seems probable that his impact on the law as we find it today has been greater than that of any other writer.

In his 1933 essay, the author advanced what was then a revolutionary concept: that in a conflicts case the choice should be between rules and not between states or jurisdictions. This flew in the face of all accepted learning. Up to that time and, indeed, for many years thereafter, it was an article of faith that in a conflicts case, a court should first by means of its choice-of-law rule select the state of the applicable law. Only then, once the state had been selected, would the court seek to identify the particular rule of the state that would decide the case. Taken at face value, this procedure was insane. For, as the author states, it required the court to put on a blindfold and to decide a question of choice of law without giving any regard to the one crucial issue, namely, what the effect of its decision would be upon the rights and duties of the parties. Instead, the author advocated that the choice should not be between states but rather between rules. In other words, the court, in deciding a question of choice of law, should first identify the relevant rule of each of the states having contact with the case. Then it should make its ultimate decision depend upon which of the several rules would best satisfy the needs of the parties, as well as the interests of the states involved. In 1933, the author was a voice crying in the wilderness. Now his view is almost universally accepted and provides the foundation stone of current American thinking on choice of law.

The remaining essays in the book, although they probably will not prove as influential as the first, live up to the author's high standards. Among other things, he discusses such well-known cases as *Babcock v. Jackson*,<sup>1</sup> *Bernkrant v. Fowler*<sup>2</sup> and *Reich v. Purcell*.<sup>3</sup> He levels effective, but gentle, criticism at the initial draft of the contracts chapter of the *Restatement (Second)*; he gives convincing support to the decision of the Supreme Court in *Klaxon v. Stentor*;<sup>4</sup>

<sup>1</sup> 12 N.Y.2d 473, 191 N.E.2d 279 (1969).

<sup>2</sup> 55 Cal. 2d 588, 360 P.2d 904 (1961).

<sup>3</sup> 67 Cal. 2d 551, 432 P.2d 727 (1967).

<sup>4</sup> 313 U.S. 487 (1941).

he discusses certain European attempts to deal in statutory form with conflict-of-laws problems; he deals at some length with certain of the conventions prepared under the auspices of the Hague Conference on Private International Law. Finally, in the last chapter, he considers some of the problems posed by mass torts resulting from airplane accidents, drugs and defective products such as asbestos. All of the essays make for excellent reading.

Many persons will undoubtedly have read at least a majority of these essays prior to the appearance of the present volume. This fact should not detract from their enjoyment. They will rejoice in the opportunity afforded them to refresh their memories, as well as in the convenience of having these well-known writings collected in a single place.

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*Reporter of the Restatement of Conflict of Laws, Second*

*Recueil des Cours de l'Académie de droit international de La Haye, 1977. Vol. V. (Vol. 158 of the collection.)* The Hague, Boston, London: Martinus Nijhoff Publishers, 1982. Pp. 392.

This volume completes the publication of the Hague Academy's courses for 1977.<sup>1</sup> Only the course, *Public International Law: Paradoxes of a Legal Order*, by Wilhelm Wengler (Free University, West Berlin) is of central interest to scholars of public international law. Four paradoxes are discussed. First, assuming a discrete sanction to be implicit in the concept of "law," and accepting that a right of reprisal could properly be considered a sanction as the legal consequence of a violation of a rule of international law, the paradox lies in the rarity with which that sanction, nowadays usually called "countermeasures," is actually exercised. Second, the proliferation of clauses providing for judicial settlement of disputes arising under that treaty has not led to frequent recourse to judicial settlement, as states seem to prefer to muddle through without clear determination of the law involved in their disputes. Third, distinctions between the *lex lata* and the *lex ferenda* are generally recognized, but in actual practice, little importance seems to be attached to the distinction. Finally, the proliferation of asserted rules regarding human rights, including rights of groups to self-determination, which seek to apply law directly to people without regard for their existing political subordination, is accompanied by basic rules emphasizing the coexistence and maintenance of "states" as such. Wengler applies a closely reasoned positivist analysis to show that these apparent paradoxes are not real. For example, with regard to the second and third paradoxes, Wengler argues convincingly that even the word "treaty" might not reflect the full intentions of parties, and that the analysis might be misleading if transactions are classified as "treaties" when the parties prefer to call their products "final acts," "protocols," "joint communiqués," or by other names with the apparent

<sup>1</sup> The other volumes were reviewed at 75 AJIL 606 (1981).



of the OAS, however, an American State must ratify the OAS Charter" (p. 45).

An abundance of information is provided on the European Communities and other European organizations. Not surprisingly, there is a good deal of overlap in the discussion of some important aspects such as the external relations of the Communities, structure, personality and distribution of competences.

The article on the external relations of the Communities contains a short but very useful analysis of the EEC treaty-making powers and of the status of international law in EC law.

The treatment of the *European Economic Community* (Oppermann) and of the *Court of Justice of the European Communities* (Pescatore) is comprehensive and fairly succinct. Readers are likely to benefit greatly from both articles.

With reference to regional problems, the volume includes, inter alia, several articles on specific boundary disputes such as the U.S.-Canadian, the U.S.-Mexican, the Guyana-Venezuelan, the *Belize* case and the disputes between China and the Soviet Union. It is unfortunate that other as yet unresolved disputes of similar or perhaps greater legal and political dimensions were not included in the volume. For example, the dispute between Argentina and the United Kingdom concerning the Malvinas (Falkland) Islands and its dependencies is mentioned only in passing in a brief paragraph within the article dealing in general with *Boundary Disputes in Latin America*.

The volume also includes articles dealing, in general, with *Boundary Disputes in Africa* (Brownlie), the *Indian Subcontinent* (Khan) and *Island Disputes in the Far East* (Chin). Of particular value to the subject of delimitation of boundaries is the treatment of the *uti possidetis* doctrine (Jiménez de Aréchaga), which provides an interesting comparative analysis of the notion of *uti possidetis* under both Roman and international law.

Several entries focus on collective self-defense treaties. The Rio Treaty, NATO, SEATO<sup>1</sup> and the Warsaw Treaty Organization are included. Logic and cohesion would have suggested, in this reviewer's opinion, the inclusion of other treaties of a similar nature such as the ANZUS Pact, discussion of which appeared in an earlier volume.<sup>2</sup> Some of the authors do not seem to have a clear perception of the nature of these treaties. For example, it is stated that the Manila Treaty is "so worded as to conform with the regional arrangements envisaged by Chapter VIII of the United Nations Charter." The fact is, however, that the treaty in question neither contains any provision to the effect that it constitutes a regional arrangement or agency under chapter VIII, nor can it be characterized as an arrangement of that nature. In the evaluation of the Inter-American Treaty of Reciprocal Assistance, its author, after mentioning that the treaty "has been applied to a broad range of international incidents," states that "a general appraisal of the role of the

<sup>1</sup> An extinct organization that basically was established pursuant to provisions of the South-East Asia Collective Defense Treaty (or Treaty of Manila), of Sept. 8, 1954.

<sup>2</sup> Instalment 3, published in 1982, entitled *Use of Force. War and Neutrality. Peace Treaties (A-M)*. Reviewed at 79 AJIL 476-79 (1985).

OAS in the application of the Rio Treaty demonstrates that this regional organization has been successful with respect to the peaceful settlement of conflicts or controversies arising among some of its member states." This seems to be an appraisal of the OAS rather than the Rio Treaty. Further, it is an evaluation of the role of the OAS in the peaceful settlement of disputes, but not of the Rio Treaty as an instrument of collective defense based on Article 51 of the UN Charter. The article on the *North Atlantic Treaty Organization*, on the other hand, is well written and highly informative.

On a different level, the reader should be warned of certain minor factual and typographical errors in the volume. For example, several times the Permanent Council of the OAS is described as acting since 1948 as provisional Organ of Consultation in application of the Rio Treaty (pp. 219-20). In fact, however, that Council was not established until 1970, when the OAS Charter was amended by the Protocol of Buenos Aires. In the article on the *Organization of African Unity*, the "OAS Council of Ministers" is mentioned on page 274, when it should read the *OAU* Council of Ministers.

The entry on American international law provides, with the objectivity and meticulous scholarship that is typical of Professor Julio Barberis, a useful analysis of the contributions the American countries have made to international law, without attempting to postulate the existence of an independent system of American international law different from general international law. A similar entry in the volume deals with Islamic international law (Khadduri) and describes the origin and evolution of the system developed by Islam (called *Siyar*) to regulate the external relations of the Islamic nations. Unfortunately, this article fails to cite in its bibliography certain important works on the subject, among them works by the Lebanese jurist Sobhy Mahmassani, such as *The Principles of International Law in the Light of Islamic Doctrine*<sup>3</sup> and the *Philosophy of Jurisprudence in Islam* (1961), and by Mustafā Siba'i, such as the *Law of Peace and War in Islam* (1953).

The foregoing observations notwithstanding, the information and insight that the great majority of the entries contribute make this volume of the *Encyclopedia* a very important addition to the literature on international organizations in general. Those seeking a general introduction to individual regional organizations and regional problems will find in this volume an enormous amount of useful material.

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*Menschenrechte in der sich wandelnden Welt. Vol. II: Theorie und Praxis: Die Verwirklichung der Menschenrechte in Afrika und im Nahen Osten.* By Felix Ermacora. Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 1983. Pp. 708. Index. DM 784, cloth; DM 700, paper.

Professor Ermacora is a professor of public law at the University of Vienna, a docent at the University of Innsbruck, a member of the Austrian Parliament

<sup>3</sup> 117 RECUEIL DES COURS 205-328 (1966 I).

and a member of both the European and the UN Human Rights Commissions. As special rapporteur of the latter, he prepared a report on Afghanistan which evoked violent Soviet criticism.

This is the second volume of a series. It is published by the Austrian Academy of Sciences through its commission for the study of human rights.

The book purports to deal with theory and praxis, the normative perspective and implementation of human rights. Special chapters deal with human rights in the Anglo-African and francophone states, the formerly Portuguese states, the Near East, Zimbabwe/Rhodesia, Ethiopia and southern Africa. The author attributes the peculiarities in African catalogs of human rights to the attempt to adapt them to tribal consciousness and peculiarities. In hardly any other continent is the discrepancy between the norms and the reality of human rights as great as it is in Africa, he says. His presentation of the implementation of human rights is sometimes somewhat cursory, except as regards Israel and the Republic of South Africa.

Most African human rights bills and constitutional provisions are modeled after the Universal Declaration of Human Rights, the European Human Rights Convention and, in francophone countries, the French Declaration on the Rights of Man. There is a tendency toward mass justice. Priority is given to the achievement of national self-determination and the fight against poverty. Thus, economic and social rights occupy an important place; there is sometimes discrimination for economic reasons, such as in Uganda. Where national self-determination has been achieved, self-reliance and the fight for power affect human rights and often lead to their suspension. Except in the Sudan, there is no protection of minorities. While in the anglophone states various aspects of human existence are basically protected, crystallized in the "rule of law," the protection of freedom in the francophone states is less differentiated. In a number of constitutions, the provisions regarding individual freedom are found in the chapter on judicial power. The highest standard of human rights is found in Senegal. In the Marxist, formerly Portuguese states, there is little human rights protection and many reservations.

As for the Arab countries, one has to distinguish between those which are Islam-oriented (Egypt, Bahrein, Jordan, Kuwait, Lebanon, Morocco, Mauritania, Qatar, Saudi Arabia, Tunisia, the United Arab Emirates and North Yemen) and those which are socialist-oriented (Algeria, Iraq, Libya, Syria, South Yemen). According to Islam, the principle of equality does not apply to those residing in enemy (non-Islamic, "dar-el-harb") countries. The inequality of the sexes is perpetuated by the Koran.

In Israel there is no catalog of human rights. They are protected, in the Anglo-Saxon tradition, by the rule of law, legislation, and judicial and administrative praxis. There is also an ombudsman. The British Defence Emergency Regulations of 1945, however, are still in force. Arabs are not subject to military service; according to the author, they are second-class citizens. He describes human rights violations in the occupied territories.

In Zimbabwe the Constitution Order of 1979 contains a Declaration of Rights on the model of the Commonwealth and the European Human Rights Convention. Human rights are being violated in internal strife.

Ethiopia has no constitution at all. There have been frequent human rights violations since the revolution.

The Republic of South Africa maintains a human rights system and the rule of law for the whites and, to a certain extent, for the colored population. Human rights are severely limited by special legislation, especially as regards personal freedom. A modicum of human rights is provided for blacks in the Homelands, but only in areas where there is self-government. Apartheid is marked by the special, inferior education of the black population under the Bantu Education Act 1953, the pass laws under the Bantu Urban Areas Consolidation Act 1945 (1948) and the territorial apartheid policy, which creates reserved areas for blacks. In Namibia (South West Africa) self-determination is still denied. According to the author, Walvis Bay is not part of Namibia. The Homelands policy has been extended to Namibia and apartheid has lately been reduced there.

In his conclusions, the author explains the great discrepancy between theory and praxis in Africa as resulting from cultural differences, the economic situation, overpopulation, the wide application of "raison d'état," certain social concepts, special ideas of happiness that human rights are thought to impede and the struggle for African nationhood in which human rights are also seen as an impediment. One cannot but agree.

The book is valuable, particularly for its ample references and wealth of documentation.

P. WEIS

*Soviet Year-Book of International Law*, 1983. Moscow: Publishing House "Nauka," 1984. Pp. 351. 4 rubles, 50 kopecks.

The international use of waters is the prominent topic of the 1983 *Soviet Year-Book of International Law*. The focus, as one might expect, is the 1982 Convention on the Law of the Sea, but there is also a paper on navigable rivers and canals. Soviet interests are dual: (1) security of Soviet territory, and (2) free passage through waters which are the territory of other states.

The first interest is manifest through comment on the Convention's authorization in its Articles 5 and 7 to calculate territorial waters from straight base lines across indented coastlines and seaward of coastal islands (a principle reenacted in a Soviet municipal law of November 24, 1982) and the Convention's authorization of security measures taken against nonpeaceful entry into a territorial zone (a principle interpreted as authorizing pursuit and detention of a vessel even on the high seas until it enters the territorial waters of its own or of a third state, if there is sufficient reason to believe that there was a trespass, and the use of armed force against intruders if there are no other means to stop the intrusion).

The second interest is served by a claim that the Convention, in creating the new concept of archipelagic waters, establishes a right of passage resembling the customary law of passage through international straits, and by a

call to the International Law Commission to draft a convention to establish a regime of merchant shipping on rivers and canals, which will prohibit discriminatory policies, even on rivers and canals entirely within the territory of a single state. The authors appear to have been moved by a press account that Japan and the United States are prepared to block passage through the La Perouse Strait in the event of exceptional circumstances and to police the Korean and Tsugaru (Sangar) Straits.

Another paper on the much debated rights and duties of nonsignatories to a convention may also prove relevant to prediction of Soviet positions on the claim of Western powers to enjoy rights under the Law of the Sea Convention even though they are not signatories. The author argues, in keeping with the position generally developed by Soviet scholars during the past decade, after decades of contrary argument, that custom must now be recognized as equal to treaty as a source of international law. While omitting comment on the Western argument that the great number of signatures on the Law of the Sea Convention has established that its provisions have entered into the realm of "custom," the author touches upon the reverse side of the coin. He argues that nonsignatories cannot argue that they are not bound to respect obligations established by the Convention if they are "analogous" to those of customary law.<sup>1</sup> Also, he argues that a signatory who withdraws is still bound to obligations of customary law, for codification does not extinguish such customary law as has been codified (citing the *Iranian Hostages* case). The author admits that there is a burden of proof to establish the existence of custom in these cases, and that the Convention's provisions alone do not meet the burden, but he says enough to indicate how complex arguments based on the relation of treaty to the creation of custom may become.

On the controversy over whether a newly developed custom can replace a previously existing treaty norm, the author argues that since both treaty and customary norms depend for their validity on acceptance by parties, a newly accepted customary norm can take precedence over a prior treaty norm. In support of his position he cites Article 38 of the International Law Commission's draft convention on treaties. Although acknowledging that this article was not included in the Convention on the Law of Treaties, he believes that the agreement of the parties to interpret the Convention in the light of agreed-upon custom in effect incorporates the principle incorporated in the excluded Article 38 in the Convention. As proof, he cites practice in the Security Council, which now accepts a resolution as having

<sup>1</sup> The Soviet Government's news agency Tass, in a statement published in *Pravda*, June 6, 1985, appears to have made the author's position official by saying:

The USSR has not recognized and does not recognize anyone's actions that are not in keeping with the UN Convention on the Law of the Sea, as expressed in the arbitrary appropriation of resources of the international area of the seabed. The issuance of licenses by the US authorities for sectors of the area of the seabed in question, in violation of the Convention that at present bears the signatures of more than 150 states and in circumvention of the preparatory commission for an international seabed authority and an international tribunal on maritime law, is illegal and at variance with the will and interests of the overwhelming majority of states.

been adopted if one of the veto-holding powers is absent, even though Article 27, paragraph 3 requires for adoption the agreement of all veto-holding powers.

As usual, the minutes of the annual meeting of the Soviet International Law Association (in this case the 26th annual meeting of 1983) offer glimpses of Soviet official attitudes in the making. I. P. Blishchenko seems determined to maintain his position that "under current conditions there is reflected in general international law the will of the broad masses and not the will of governing classes" (p. 229). Again, he is criticized, as has been the case previously, this time by V. E. Gulaev, who declared that he could not agree with such a proposition (p. 230).

As in the past, principal articles (but not the briefer "scientific reports") are summarized in English. Also, the volume contains book reviews, primarily of books by authors in Eastern Europe, and bibliographies of Eastern European works (except for Albania). The sole document is the 1983 Madrid declaration of the Helsinki review conference. Thus ends the 25th volume of the *Year-Book* series.

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*International Monetary Collaboration.* By Richard W. Edwards, Jr. Dobbs Ferry: Transnational Publishers, Inc., 1985. Pp. xxiv, 822. Index. \$85.

On August 12, 1982, the Mexican Minister of Finance and Public Credit informed the U.S. Government that Mexico did not have the hard currency needed to meet its current scheduled principal and interest payments to Western commercial bank creditors. Although the U.S. Government and the private bankers were quite taken aback by this announcement, their prompt response was the "Mexican Rescue."<sup>1</sup> In the first stage of the rescue, official public lenders provided Mexico with money or prospects for money so that the country would not default on its loans and could continue to import basic goods and services. The support package stitched together in August included (1) a \$1 billion advance payment from the United States for future oil shipments under the contract between Mexico's public oil company and the U.S. Department of Energy; (2) \$1.8 billion in new credit put together by the Bank for International Settlements (BIS) and syndicated among the central banks of the major industrial countries; (3) prospective access to about \$4 billion in funds from the International Monetary Fund (IMF), contingent upon successful negotiations with the IMF for an economic adjustment program by Mexico; and (4) an agreement by the United States to guarantee loans up to \$1 billion for imports of basic foodstuffs into Mexico. The first stage of the rescue provided temporary respite so that Mexico could negotiate longer term relief from the private creditors. In the second

<sup>1</sup> J. KRAFT, *THE MEXICAN RESCUE* (1984), is a detailed account of the financial arrangements negotiated by public and private institutions after the announcement that Mexico was not able to service its foreign debt.

stage of the rescue, private banks rescheduled much of Mexico's indebtedness, and the banks and the IMF advanced Mexico billions of dollars in new loans.

The Mexican rescue described above was the trigger for a crisis in international finance that has persisted, and in certain ways deepened, in the last 3 years. Although Professor Richard Edwards's *International Monetary Collaboration* touches upon the current international debt crisis only occasionally (pp. 129-33, 270, 411-13, 619-20), the crisis suggests both the usefulness and the limitations of the treatise.<sup>2</sup>

I should like to start with the usefulness of the treatise, for its main purpose is to serve as an educational or reference source. It is successful in achieving this purpose. The book provides a most comprehensive treatment of the institutions that formally regulate and control public international finance, especially balance-of-payments financing and exchange rate regimes. Lawyers, economists and anyone else desiring a thoughtful and clear introduction to public international finance in general, or the debt crisis in particular, should consult this work. As a scholarly (i.e., heavily footnoted) examination of international monetary structures and a detailed analysis of the IMF Articles of Agreement, the work is also of use to persons already knowledgeable in the field.

*International Monetary Collaboration* proceeds in three parts. The first part (chs. 1-2) describes the primary institutions of public international finance: the IMF, the World Bank, BIS and other global or regional organizations. The IMF is the key institution. Created by the Bretton Woods Agreements of 1944, the IMF is charged with facilitating international monetary cooperation and exchange rate stability, discouraging foreign exchange restrictions and enabling countries to deal with short-term maladjustments in their balance of payments (pp. 11-12). This part is brief and largely descriptive.

The second part (chs. 3-9) describes the mechanisms used by the IMF and other multilateral institutions to facilitate balance-of-payment transactions among countries. This part is the core of the book, and it is a clear and extraordinarily thorough account of how these public mechanisms actually work. The chapters on the IMF mechanisms (chs. 5-6) are particularly useful, both in general and in connection with the international debt crisis. A country that is a member of the IMF and that encounters short-term balance-of-payments deficits may obtain freely usable currencies by converting to hard currency the "special drawing rights" (SDRs) it has with the IMF, up to a certain percentage of its own contribution to the Fund (its "réserve tranche"). After a country has exceeded its réserve tranche, it may obtain further credit upon application to the IMF. These lines of public credit have become critically important to developing countries because they provide funds needed by indebted countries to redress balance-of-payments problems, which have been severe since the oil price shocks of the 1970s.

<sup>2</sup> I use the example of the international debt crisis, not because Professor Edwards considers it critical, but because it is a matter of scholarly and public concern to which a treatise like this one has much to contribute.

Because the additional credit beyond the *r  serve tranche* is typically accompanied by a standby or extended arrangement in which the country gives the IMF assurances concerning policies it will follow to redress the balance-of-payments problems, these lines of IMF credit have become important to creditors of developing countries as well. The IMF conditions the further credit upon those assurances, typically after its own review of the country's situation indicates that the policies will work. The World Bank and private creditors rely upon the IMF's conditional arrangements in their own evaluations of the creditworthiness of the country.

The third part (chs. 10–12) describes the “code of good conduct” in international monetary affairs, including exchange controls (relating to both current transactions and capital movements) and exchange rate regimes. But, as Edwards says, “[t]he most fundamental obligations of the international monetary order are to consult and to collaborate” (p. 379). The lengthy chapter 12 on “Consultation and Collaboration” is an excellent summary of the operation of public international financial institutions and of the thesis that international dialogue is necessary and (on the whole) efficacious to establish a workable system of public international finance. The international debt crisis, for example, has seen continuous cooperation among United States policymakers, the central banks in Western Europe, the IMF, BIS, other institutions and the debtor countries.

*International Monetary Collaboration* is successful in its primary goal of describing a self-contained coherent system of interrelated institutions cooperating to facilitate international finance. While the treatise splendidly carries out the vision of its author, it is also limited by that vision, in three ways.

First, the system that Edwards obviously admires (e.g., pp. xxii, 655–57) is less coherent than it once was, and some would argue that little coherence remains. The system of public international finance envisioned at Bretton Woods rested upon three concepts: the strength of the U.S. dollar as the standard of value; relatively fixed exchange rates monitored and adjusted through consultation and the IMF; and public credit facilities available by means of the IMF, the World Bank and BIS. This was a system that may have worked well through the 1950s, but the system is now “in transition” (at the very least). The U.S. inflation and economic difficulties arising in the late 1960s led to President Nixon's revocation of convertibility of U.S. dollars into gold in 1971; as the dollar and other major currencies “floated,” the IMF's power to regulate exchange rates declined (see pp. 491–502). The result of these developments has been to introduce significantly greater instability in international exchange rates and monetary policies.<sup>3</sup> Though Edwards traces some of the experiments and accommodations following the collapse of fixed exchange rates, one could wish for a more comprehensive review of the problems with the present indeterminacy or the alternative approaches that might be adopted.

<sup>3</sup> See FLOATING EXCHANGE RATES AND THE STATE OF WORLD TRADE PAYMENTS at xv (D. Bigman & T. Taya eds. 1984); THE FUTURE OF THE INTERNATIONAL MONETARY SYSTEM 1–3 (T. Agmon, R. Hawkins & R. Levich eds. 1983).



Second, the current relevance of the international system described by Edwards has somewhat eroded. Specifically, the public institutions have assumed a less important role in balance-of-payments financing, at least temporarily replaced by private commercial banks. The "public" facilitation of balance-of-payments financing has been partly displaced by "private" mechanisms. This process started in the 1960s, when many Third World countries sought loans from internationally expanding commercial banks of Western countries. The very large trade deficits of many such countries after the 1973 oil price increases were covered by even more massive private lending from Western banks, often with minimal public involvement.<sup>4</sup> The crisis resulting from this mania of private lending has generated renewed importance for the role of the IMF and other public institutions. But "international monetary collaboration" now includes private banks as well as the traditional public institutions. These developments suggest the need for rethinking the nature of international balance-of-payments finance.<sup>5</sup> What additional risks are posed by the increased private role? How have the mechanics and nature of international monetary collaboration changed as a result? The increasing interconnection of public and private structures of international finance deserves more attention in comprehensive treatises such as this one.

Third, although one of the treatise's aspirations is a critical analysis of the economic assumptions of the institutions of public international finance, Edwards is "by nature an optimist. . . . tend[ing] to look for the positive opportunities in multilateral endeavors" (p. xxii). He seems fairly confident that the institutions are designed to assure a net gain in international economic output and that "the gain is fairly shared" (p. 657). The latter proposition is now controversial. Western industrial countries, of course, devised the Bretton Woods system, and those same countries have in absolute terms been the main beneficiaries of that system. This has been dramatically illustrated in the international debt crisis. Western bankers clamored to make loans of unprecedented size to Latin American countries in the 1970s. In retrospect, those loans were irresponsibly large, especially in light of the higher interest rates that have prevailed in the 1980s (itself a result of undisciplined or irresponsible U.S. policy). Even though most of the misjudgment was that of Western officials and bankers, the burden of the debt crisis has fallen mostly on the Latin American countries themselves, which have forgone needed capital goods imports and local capital formation to pay just the yearly interest charges, and whose people have suffered declines in real wages for most of the 1980s.<sup>6</sup>

Scholars and commentators have complained that the consultative mechanisms of public international finance in general, and the central influence

<sup>4</sup> See W. CLINE, *INTERNATIONAL DEBT: SYSTEMIC RISK AND POLICY RESPONSE* 2-3 (1984) (Table 1-1).

<sup>5</sup> A similar intellectual shift may be occurring in international relations theory. See O'Meara, *Regimes and Their Implications for International Theory*, 13 J. INT'L STUD. 245 (1984).

<sup>6</sup> See Diaz-Alejandro, *Latin American Debt: I Don't Think We Are in Kansas Anymore*, 1984 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 335; Eskridge, *Les Jeux Sont Faits: Structural Origins of the International Debt Problem*, 25 VA. J. INT'L L. 281, 362-88 (1985).

of the IMF in particular, have systematically favored the Western banks and whipsawed Third World countries into making enormous short-term sacrifices that have long-term deleterious effects on the countries' economies.<sup>7</sup> Such criticisms are virtually ignored by Edwards because he adopts an essentially proceduralist view of justice: if issues are discussed freely, then decisions will be fair. Free and open collaboration may not work justice, however, where most of the interlocutors (including many supposedly representing Third World countries) accept the basic terms of discourse favored by the United States, and where the debtor countries perceive themselves as powerless bargainers. My problem with Edwards's optimism is that consultation and collaboration, while wonderful mechanisms of justice and co-operation for entities having equal sophistication and bargaining power, can easily be mechanisms of oppression when some participants dominate the process.

Edwards has performed an invaluable scholarly service by setting forth in detail the now classic structure of the public institutions of international finance. And his book is a powerful document supporting his view that there is a coherent, relevant system of public collaboration that produces fair results. I respect the book and its viewpoint but respectfully dissent from the breadth of its optimism.

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*Le droit des relations économiques internationales: Etudes offertes à Berthold Goldman.* Paris: Librairies Techniques, 1982. Pp. xvi, 429. F. 288.

This collection of essays in honor of Professor Berthold Goldman deals primarily with international commercial law rather than with what has come to be known as international economic or development law. Most of the essays touch, in greater or lesser detail, on the concept of *lex mercatoria*, to the development of which Goldman has made a singular and distinguished contribution.<sup>1</sup> In his view, *lex mercatoria* is a distinct and autonomous body of international law that governs commercial relations and relies essentially on international contracts and the stipulations they contain as to the appropriate law and on international arbitration.<sup>2</sup>

<sup>7</sup> See, e.g., Hurlock, *Debt Restructure Agreements: Perspective of Counsel for Borrowing Countries*, in *A DANCE ALONG THE PRECIPICE* 119 (W. Eskridge ed. 1985); Sutton, *Structuralism: The Latin American Record & the New Critique*, in *THE IMF AND STABILIZATION: DEVELOPING COUNTRY EXPERIENCES* 19 (T. Killick ed. 1984). Edwards has only this to say: "Also, economists may differ about the economic policies to be pursued [in IMF-sanctioned arrangements]. Marxist economists have often been especially critical of economic policies favored by the IMF" (p. 270). The implication of this statement is inappropriate. Serious economists representing many perspectives have been "especially critical" of the IMF.

<sup>1</sup> In addition to Professor Goldman's curriculum vitae, the book contains an eight-page list of his major works (pp. vi-xiv), perhaps the most important of which is *Droit commercial européen* (1969, 1971 and 1975), published in 1973 in both English and German translations.

<sup>2</sup> Goldman, *Frontières du droit et lex mercatoria*, in 9 *ARCHIVES DE LA PHILOSOPHIE DU DROIT* 177 (1964).

The collection does not have all the usual shortcomings of a *Festschrift* since its compilers (Professors Fouchard, Kahn and Lyon-Caen) limited potential contributions to those dealing with the main themes of Goldman's work. The resulting degree of homogeneity is a welcome feature. Nevertheless, the compilers' reluctance to play the role of editors (they caution in the foreword that "the honoring of a master is a gesture which brings glory to those who accomplish it more than to him to whom it is addressed") results in several shortcomings. The most notable is the lack of any structure in the presentation. Instead, the various contributions are arranged solely on the basis of the alphabetic order of the authors' names. The collection would have profited from being organized around a number of themes, which would have been a rather straightforward task given the homogeneity of the topics. The collection also has no index.

Many contributions underline the artificiality of insisting too strongly on the distinction between private and public international law, particularly in the field of commercial relations. Thus, for example, it is argued that instruments such as codes of conduct applicable to the activities of transnational corporations might well determine the outcome of international commercial arbitrations despite their formally nonbinding status in international law (Sanders). Other contributions focus, *inter alia*, on the standing of the concept of *lex mercatoria* (Lagarde, von Mehren, Virally); the relevant jurisprudence of the French Cour de Cassation (Ponsard); the Iran-U.S. Claims Tribunal (Seidl-Hohenveldern); general principles of law governing state contracts (Weil); the normative work of the International Chamber of Commerce in the banking field (Stoufflet); codification and international arbitration (Lalive); private codes of conduct (Farjat); EEC competition law (Kovar); and state sovereignty and international arbitration (Rigaux).

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*International Law and the New States of Africa.* By Yilma Makonnen. Published with the assistance of UNESCO under the Regional Participation Programme for Africa, Addis Abeba, 1983. Pp. xxvi, 575. Index. Distributed by UNIPUB.

This book is an interesting study of aspects of the problem of state succession, in the context generally of newly independent states emerging from colonial rule and, in particular, relating to Kenya, Tanzania, Uganda and Burundi, Malawi, Rwanda, Somalia and Zambia. The work is a significant and painstaking review of an important contemporary aspect of the law of treaties; it is also a useful compilation of a variety of historic, economic and political material relating to these East African states. Its title is therefore deceptive; the work does not purport to constitute a definitive study of the relationship between the "new states of Africa" and international law—a study that might, for example, have been expected to include an exhaustive appreciation of the substantial African case load in the International Court

since 1960. The book is therefore better described by its subtitle: *A Study of the International Legal Problems of State Succession in the Newly Independent States of Eastern Africa*.

It is divided into three parts, respectively entitled "International Law and the Newly Independent States of Eastern Africa," "Eastern Africa and the Problems of State Succession in Public International Law" and "The Practice of the Eastern Africa<sup>1</sup> States in Matters of State Succession." Appendixes contain the Vienna Conventions on Succession of States in Respect of Treaties and in Respect of State Property, Archives and Debts.<sup>2</sup> The first part (pp. 1-97) is divided into two chapters. The first chapter sets out a brief history of the road to independence followed by each of the eight East African states, in the form of a *tour d'horizon* of political history. It also presents a straightforward indication of the point of view of the author, which is that of a Third World jurist—an African—whose strong feelings about the legitimacy of what he terms "colonial" international law" quite naturally affect his view of the subject.<sup>3</sup> Dr. Makonnen has for the past 9 years served in a legal position with the United Nations, and brings to this book a perspective gained from that environment.

The second chapter comprises four interrelated essays. It begins with slightly rambling discourses on the approaches and attitudes of East African states toward international law and its established rules, as well as toward the International Court, and continues with a description of what is termed "the Problem of Succession to the General Rules of International Law." This latter is of considerable interest, although the author's point of view concerning the prerogatives of newly independent states, in relation to their "freedom" to accept or reject established rules of international law, may perhaps be more sympathetically received by lawyers from the newly independent states themselves, or socialist countries, than by lawyers in developed countries of the West.<sup>4</sup> Moreover, the discussion of the relationship of the concept of "state succession" to the requirement (*vel non*) to accept or to reject established norms of international law could have benefited by a more

<sup>1</sup> Throughout the book, reference is made to "Eastern [or East] Africa states."

<sup>2</sup> Respectively, UN Docs. A/CONF.80/31 (1978) and A/CONF.117/14 (1983).

<sup>3</sup> See, e.g., p. 15: "At this stage of the present investigation, there is no doubt that all of the Eastern Africa chiefdoms and kingdoms lost their international legal personalities by outright violations of the terms of the treaties of protection and alliance by the colonial powers." Thus, the community of nations of the 19th century is characterized as "an exclusively European club" (p. 10); the conclusion is expressed that "the Eastern Africa chiefdoms and kingdoms had been robbed of their sovereignty and international legal personality and reduced to objects of international law" (p. 11); and the observation is made that the existing "rules of international law . . . are not universal in content and application and thus do not incorporate African values, culture or interests" (p. 80).

<sup>4</sup> See, e.g., pp. 96-97:

Thus, in conclusion, despite the fact that the Eastern Africa States have accepted some positive rules of general international law upon independence, and although they have also accepted *jus cogens* as provided for in the Vienna Convention, it is evident that there are no mandatory international legal rules which *ipso jure* oblige them to accept any category of rules of public international law.

expansive and legal approach than it has been accorded; it would have been interesting to see a solid appreciation of the relationship of customary international law and the practice of states (with the necessary *opinio juris*) to the idea advanced by the author that there are no restraints on the freedom of a newly independent state to "pick and choose" amongst its international obligations, whatever they may be.

The second part of the book, concerning the specific problems of state succession and their resolution in respect of East African independence, appears to be its *raison d'être*. Following a workmanlike and broadly based analysis of the major trends in international law in respect of this difficult and elusive topic, primarily descriptive of the antinomy between the positivism of O'Connell, on the one hand,<sup>5</sup> and the adherence of the developing and newly independent nations to the "clean-slate" doctrine, on the other, the author elaborates upon what he terms the "Eastern Africa optional doctrine of state succession" (also referred to as the "Nyerere Doctrine")<sup>6</sup>; this expression stands for the provisional application of antecedent treaties coupled with a 24-month reflection period during which a determination may be made as to "opting in" to their obligations. It is interesting to learn the extent to which, in their decolonizations occurring after 1960, the newly independent East African states were no longer prepared to accept the imposition of inheritance agreements or similar undertakings at the behest of the former colonial powers.<sup>7</sup> The final part of Makonnen's study relates to state practice in East Africa in respect of the effects of state succession on financial and economic rights and obligations and on international boundaries and territorial claims; it contains interesting and extensive material relating to the colonial borrowings of several of these states.

On the positive side, the value of this study is that it draws into relatively sharp focus a regional contribution to contemporary international legal practice; it places that practice and contribution in the context of legal principles; and it opens a variety of related subjects for serious consideration in the overall context of the role of the recently emancipated states of Africa.

<sup>5</sup> D. P. O'Connell receives his fair share of opposition: See, e.g., pp. 71, 139, 227-78, 298 and 372.

<sup>6</sup> Although reference is made to the initiative taken by GATT to establish the legitimacy of such new state options and a reflection period for opting in, the author appears—almost defensively—to resist any suggestion that the subject under discussion was not owing to the East African states and to Dr. Nyerere in particular. See pp. 231-32, 491.

This method or device emanated from the general policy of GATT based on expediency rather than on recognition of the international right of a successor State to an option or a period of reflection. . . . Furthermore, there is no evidence to suggest that the Eastern Africa leaders, at the time of the first declaration of the optional doctrine by Tanganyika, were conversant with or were somehow influenced by this GATT method [p. 232].

<sup>7</sup> The development of the subject would have benefited from more precise detail, perhaps in the form of interviews or *notes verbales*, relating to the formulation by these states of East Africa of the position that they could "pick and choose" amongst the preindependence obligations on a modified "clean-slate" theory; the reader is kept in suspense for a number of pages while the discussion refers to the "East African optional doctrine," without being told quite clearly at that stage what it actually is.

Makonnen is without question a highly energetic and capable scholar; the work shows a sustained depth of research and consideration that does him much credit, and one looks forward with great interest to his further work. In particular, the author shows considerable ability in summarizing and expressing major principles and relating them to current situations.

A minor substantive criticism on the negative side is that the work would have benefited from removal of even trivial pejorative remarks directed at Western and former colonial values and structures. Although most of the work is praiseworthy in its dispassionate and scholarly tone, it contains occasional lapses into mild invective that do not assist progress of thought and tend to distract the interested and sympathetic reader.<sup>8</sup> It is no longer necessary (particularly in a work of this nature) to denounce the wrongs of colonialism; to do so is a supererogatory exercise in beating an undeniably dead horse and gives the impression of edging over into political apology. What is more important is that not one of the many excellent and substantively valid points made by the author would have had to be modified—or even colorably affected—if each occasional passage of rhetoric had been excised or amended. It is a question of emphasis and descriptive technique, rather than a difference attaching to the substance.

Criticism of the form of the book might also result in the caviling suggestion that a slightly better approach might have been to state the “East African optional doctrine” first, and then to elaborate it with discussion of the concepts that it illustrates and the principles to which it relates. Makonnen’s method is the reverse: to proceed from the general premise to the particular illustration, and the arguments therefore descend from the more abstract rule to the concrete example.<sup>9</sup> The organization is perhaps also too intricate and striated for a subject of this nature, but perhaps this is inevitable in view of the combination of the geographically organized objects of discussion and the chronological context of the basic subject.<sup>10</sup> A veritable bounty of ma-

<sup>8</sup> Comments such as “[w]hy the colonial power would be interested in the development of the colonial territory if it did not serve its exploitative interests would be beyond anyone’s imagination” (p. 374) do not reassure the objective mind. Nor does it help to refer repeatedly (p. 373) to the “so-called doctrine of unjust enrichment” (emphasis added); to imply that all non-African Kenyans were settlers or aliens, excluding any contemplation that nonindigenous or non-African individuals might validly have acquired Kenyan citizenship (p. 364); or to conclude (without citation or authority) in respect of development expenditures, undertaken as a result of the flotation of what is referred to as the “so-called public debts” of the then colonial territories, that “[a]vailable evidence shows clearly that the territories (meaning the indigenous African territories and their economic sectors) did not benefit from such colonial investments, whether in the infrastructure development sector or for social services” (p. 406).

<sup>9</sup> The fact that his book intends to deal specifically with the experiences and practice of eight separate states, moreover, naturally leads to the result that the text must periodically traverse or canvass the entire constituency. This is a structural difficulty that creates minor frustration in the reader—together with a sense of *anomie*—when the state(s) under consideration may not have much to offer in the line of a certain type of experience or in relation to a given specific aspect of the problem.

<sup>10</sup> One cannot avoid the impression that the work was perhaps constructed from several different essays or articles: one on the principles of international law and the newly independent states; one on the problems of state succession confronting such states; one on the history and

terial is contained in the notes which, alas, are end notes to chapters rather than footnotes to pages.<sup>11</sup> From the point of view of completeness and clarity, the index could have borne considerable expansion.

To sum up, this book is a useful contribution to the literature on a difficult and vexing topic of contemporary international law, as well as an interesting and suggestive summary and compilation of data and materials relating to the pre- and postindependence political and economic situations of the eight East African states under discussion. As former President Elias has written in the foreword:

In a long and wide ranging study such as this it is not possible to agree with everything, but it is at least possible to conclude that the effort made by the author will be found to be as rewarding as it is worthwhile. This book is an important contribution to the literature on a section of the Law of Treaties which has contemporary relevance (p. xvii).

This study would be a valuable addition to the shelf of any international lawyer who is generally concerned with problems of state succession. It would also be valuable for the lawyer, historian and political scientist interested in the history of decolonization and the accession of formerly colonial territories to independence. Last, it constitutes a valuable and compendious anthology of historical—and also economic—materials relating to the eight East African countries concerned.

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*L'Applicabilité du traité instituant la C.E.E. et du droit dérivé au plateau continental des états membres.* By Michel Michael. Paris: Librairie Générale de Droit et de Jurisprudence, 1984. Pp. xxiv, 301. F.220.

Does the Treaty of Rome apply to the continental shelf off the coasts of the member states of the European Economic Community and to its oil and gas resources? In the words of Dean Colliard's trenchant foreword, "Rien n'est moins sûr" (p. xxiii).

One reason lawyers have difficulty answering the question is that, under general international law, the coastal state does not have sovereignty over the continental shelf—as it does over its land, as well as its internal waters

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background, pre- and postdecolonization, of the states in question; one on the actual development and application of the "East Africa optional doctrine"; and perhaps several theoretical pieces on questions such as the relationship of *jus cogens* to state succession.

<sup>11</sup> This reviewer, who harbors a doubtless unreasonable prejudice against end notes, would have much preferred a different approach to notation: it is interesting how, when the discourse of the book becomes somewhat stolidly abstract, the meaty and concrete data are to be found in an end note. One suggests that if this worthy study undergoes a new edition, consideration be given to incorporating many of the quotations and comments now residing in the end notes into the actual text of the work itself; leaving references only for the notes; and moving them, in any event, to the foot of the relevant pages.

and territorial sea—but has more limited functional sovereign rights for the purpose of exploring the shelf and exploiting its natural resources. The text of the Treaty of Rome does not expressly address the scope of its general geographic application.<sup>1</sup> Even if the “drafters” of the 1957 Treaty were, in some sense, “aware” of the emerging continental shelf doctrine that was the subject of contemporaneous work by the International Law Commission, it is not clear what their silence implies.<sup>2</sup>

We are confronted with one of the more fascinating types of legal problems: what happens at the intersection of two bodies of law developed with supreme indifference to each other's complexity? The complex jurisdictional categories of the modern international law of the sea were developed largely on the assumption that the relevant actors are fully sovereign unitary states in the classic sense. The complex qualifications on the sovereignty of the member states of the European Community appear to have been developed largely on the assumption that the scope of that sovereignty under international law—particularly territorial sovereignty and perhaps sovereignty with respect to ships of national registry<sup>3</sup>—was a rather straightforward matter insofar as the Treaty of Rome is concerned. In a sense, each body of law “assumes” that the other will dispose of the question of what occurs when they intersect.

The complexity of the issue has increased with the advent of the 200-mile exclusive economic zone, which embraces the resources of both the seabed and the water column. The International Court of Justice recently pointed out that “the two institutions—continental shelf and exclusive economic zone—are linked together in modern law.”<sup>4</sup> Michel Michael amply exploits the irony that the newer 200-mile fisheries jurisdiction of coastal states was made a matter of Community competence *ab initio* (pp. 176–79), while the question of Community competence with respect to preexisting continental shelf jurisdiction on the seabed remains unresolved in largely the same geographic area.<sup>5</sup>

<sup>1</sup> Article 227, paragraph 1 of the Treaty specifies, “This Treaty shall apply to [here the article lists the names of the member states].” If relevant, paragraph 4 is scarcely more illuminating: “The provisions of this Treaty shall apply to the European territories for whose external relations a Member State is responsible.” Treaty Establishing the European Economic Community, Mar. 25, 1957, Art. 227, paras. 1 and 4, 298 UNTS 11.

<sup>2</sup> Compare pp. 102–03. Mr. Michael might note that Georges Scelle of France rejected the concept of the continental shelf in the International Law Commission, [1951] 1 Y.B. INT'L L. COMM'N 346, UN Doc. A/CN.4/SER.A/1951, as did West Germany in its proposal to the 1958 Conference on the Law of the Sea, 6 UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS 125–26, UN Doc. A/CONF.13/42 (1958).

<sup>3</sup> Article 84 applies common rules to transport by rail, road and inland waterway but defers the imposition of Community rules with respect to sea and air transport to a subsequent unanimous decision of the Council. EEC Treaty, *supra* note 1, Art. 84.

<sup>4</sup> Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 ICJ 13, 33 (Judgment of June 3).

<sup>5</sup> In December 1984, the Community submitted a declaration regarding its competence in connection with its signature of the United Nations Convention on the Law of the Sea. The declaration makes no express reference either to the continental shelf or to hydrocarbons. A footnote contains the following statement: “The United Nations Convention on the Law of



Daniel Vignes, who has also had to face the practical implications of this question in his official capacity, points out that no problems give as much intellectual satisfaction to the internationalist as "les études de confins"; more than others, they are multidisciplinary.<sup>6</sup> Michael, with the aid of a grant from the Commission of the European Communities, has written his book in this spirit. Though comprehensive, it does not attempt to hide his "communitarian" bias. He begins by examining the international law of the continental shelf and the continental shelf laws of the member states as they bear on this question, compares these with the requirements of Community law, considers the various legal bases that might support Community jurisdiction and concludes with an analysis of various consequences that could flow from the application of Community law to the continental shelf.

Michael notes that the "constitutional" issues posed by the law of the sea for the EEC were also posed for many federal states. Except perhaps for the case of the Soviet Union, he is nevertheless a bit too sanguine about the ease with which the central governments of large federal states won their battles on the same issue with their "states" or provinces. The political disputes in Australia, Canada and the United States were, and to some degree still are, bitter.<sup>7</sup> What might have been noted is that the fights in the federally organized states were (and are) mostly over money (royalties, taxes and perhaps leverage to encourage political contributions). From that perspective, assuming Mr. Michael has more than budgetary reasons for favoring Community jurisdiction,<sup>8</sup> it may have been imprudent for him to suggest as a possible goal the sharing of benefits. The UK Government already regards its financial contributions to the EEC as excessive.

What difference does it make whether Community law applies? Michael carefully contrasts the continental shelf development laws of the member states with the basic requirements of the Treaty of Rome and directives implementing those requirements. What he finds is that certain national laws and policies, particularly those of the United Kingdom, may not be compatible with general Community directives implementing some of the most basic concepts of the Community, including the following summarized in Article 3:

- (a) the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;<sup>9</sup>

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the Sea shall apply, with regard to matters transferred to the European Economic Community to the territories in which the Treaty establishing the European Economic Community is applied and under the conditions laid down in that Treaty." UN LAW OF THE SEA BULL., No. 5, at 26, 27 (1985).

<sup>6</sup> He credits Charles De Visscher with the thought (p. xvii).

<sup>7</sup> One may argue that a similar dispute contributed to the bloodshed in Nigeria's civil war.

<sup>8</sup> This reader has the impression that, in addition to his enthusiasm for European integration in principle, Michael believes Greece would be in a stronger position with respect to its offshore boundary dispute with Turkey if it were defending Community interests. See p. 141 and n. 149.

<sup>9</sup> See EEC Treaty, *supra* note 1, Arts. 9, 30, 35, 37.

(b) the establishment . . . of a common commercial policy towards third countries;<sup>10</sup>

(c) the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital.<sup>11</sup>

May a member state adopt measures designed to promote the use of its continental shelf resources by its own nationals in preference to the nationals of other member states? Particularly important questions are whether foreign nationals will have an opportunity to participate in the extraction and processing of continental shelf resources on an equal footing and whether the coastal state has the right to restrict the export of hydrocarbons to other member states until national needs are met, in the event of another crisis in supply.

Michael goes far beyond these questions. He poses the much broader issue of a common energy (or petroleum) policy analogous to the common trade,<sup>12</sup> transport<sup>13</sup> and agricultural (including fisheries)<sup>14</sup> policies of the Community. This notion implicates not only the geographic scope of the Community's jurisdiction but also in some respects its subject matter jurisdiction, since the EEC Treaty says nothing about a common energy policy as such.<sup>15</sup> Whatever the difficulties posed by mere adherence to general Community rules such as those on the free movement of goods and provision of services, the formulation and implementation of a common energy policy would be a still more complex undertaking.<sup>16</sup> As Michael's conception of a public European petroleum enterprise becomes clearer toward the end,<sup>17</sup> there may be a dramatic increase in the number of financial, ideological and political nerves likely to twitch.

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*Die Zwischenstaatlichkeitsklausel in den Wettbewerbsvorschriften des EWG-Vertrages und des Freihandelsabkommens Schweiz-EWG.* By Kamil Braxator. Bern and Frankfurt am Main: Peter Lang, 1982. Pp. 266. Sw.F.49.

<sup>10</sup> See *id.*, Arts. 111, 113.

<sup>11</sup> See *id.*, Arts. 52, 59; see also *id.*, Art. 92.

<sup>12</sup> *Id.*, Art. 113.

<sup>13</sup> *Id.*, Arts. 74-75.

<sup>14</sup> *Id.*, Arts. 38-39.

<sup>15</sup> Aspects of the EEC Treaty, *id.*, as well as the European Coal and Steel Community Treaty, Apr. 18, 1951, 261 UNTS 140, and the EURATOM Treaty, Mar. 25, 1957, 298 UNTS 167, are of course relevant.

<sup>16</sup> At least in some respects this may depend on the possibilities for achieving unanimity under Article 235 of the EEC Treaty, *supra* note 1, or Council practice following the so-called Luxembourg accords. See 5 ILM 316, 317 (1966); A. PARRY & J. DINNAGE, PARRY & HARDY: EEC LAW 31-32 (2d ed. 1981). For a review of energy policy measures taken, see 3 H. SMIT & P. HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY, sec. 103.02[a][2], at 611-13, sec. 103.15, at 624-26 (rev. ed. 1985).

<sup>17</sup> Such ideas are, as here, frequently accompanied by ritual intoning of an assumed need to combine in order to compete effectively with American giants. Precisely what happened to Shell and BP?

The subject of this study, which appears as volume 317 of the European University Studies Law series, is a comparison between the "interstate commerce clause" in the EEC competition rules and the one in the Free Trade Agreement (FTA) between the EEC and Switzerland. The interstate commerce clause is an integral part of the competition rules of the Rome Treaty (Arts. 85-86) and serves to render agreements, decisions and concerted practices that are restrictive of competition unlawful only to the extent that trade between EEC member states may be affected. It is in similar fashion contained in Article 23 of the FTA with Switzerland, except that reference is made to the trade between the Community and Switzerland.

The EEC institutions have declared that they will interpret Article 23, paragraph 1 of the FTA in the same manner as the competition rules of the Rome Treaty. The author, who is Swiss, points out rightly that this declaration cannot bind Switzerland. He raises the relevant and interesting question whether the differences between the EEC competition rules and Article 23 of the FTA (where the nullity and exemptions clauses are missing) necessitate a differing interpretation of the interstate commerce clause.

The study is divided into two main parts. The first part examines the interstate commerce clause as contained in Articles 85-86 and develops an interpretation. The second part is devoted to interpreting the interstate commerce clause in Article 23 of the FTA. A comparison between the two clauses concludes the study.

With respect to Articles 85-86, the author rightly emphasizes the importance of the "teleological" interpretation, in the light of the relevant jurisprudence of the European Court of Justice. After a thorough analysis, using various methods of legal interpretation and comparing their results, the author adopts a broad meaning of the interstate commerce clause in Articles 85-86.

The term "trade" is interpreted as encompassing not only commerce in commodities and goods, including production equipment, but also services. Trade between the EEC member states as well as domestic trade (within one member state) is included, but not trade with non-Community states since the latter is subject only to the Treaty rules on a "common commercial policy" (Arts. 110-116). Any direct and actual effect on interstate trade is sufficient to be qualified as restraint; in addition, indirect or potential effects may so qualify. Once it has been established, no evaluation of the advantages and disadvantages of the restraint of trade and commerce is possible, according to the author; rather, the rules of Articles 85(1) and (2), and 86 must be applied. With respect to the latter finding, the question may be raised whether the Commission could (and should) carry out such an evaluation in applying Article 85(3) of the Rome Treaty.

The author's interpretation of Article 23 of the FTA is much narrower. Based mainly on a systematic and teleological interpretation, "trade" is viewed as including only industrial products (services are excluded). Trade between the FTA partners is to consist of both interstate and domestic trade. The notion of "effect" has, in the author's view, a narrow meaning, namely, only seriously detrimental restrictions of trade between the FTA partners.

Finally, the interstate commerce clause is seen as involving a "rule of reason" (depending on the trade policy of the FTA partners), which permits evaluating the advantages and disadvantages of the restraint of trade. This allows one to establish in a given case whether the impairment of trade between the FTA partners is outweighed by the benefits to the partners, and thus to weigh the restrictive practices in light of the purpose of the free trade zone, namely, the promotion of the free flow of trade. Such restrictive practices are, in the author's view, not necessarily incompatible with the successful functioning of the Free Trade Agreement.

These findings are summarized and commented upon in a final, third part. A summary is provided in German, English and Russian.

While Braxator's results appear logical and well reasoned, one would nevertheless have wished to see in the course of his consideration more references to the case law and administrative practice concerning this problem. With respect to Articles 85-86 of the Rome Treaty, a more detailed consideration of the case law of the European Court of Justice (only the *LTM/MBU* and *Consten-Grundig* cases are briefly referred to) would have been useful. In particular, the *Hoffmann-La Roche* case concerning the practices of the Swiss pharmaceutical giant in the vitamin drug market, which gave rise to a diplomatic exchange in the Swiss-EEC Mixed Commission on the interpretation of the Free Trade Agreement and which resulted in the *Adams* case before the Swiss Federal Tribunal, is relevant and should therefore have been commented on. The *Hoffmann-La Roche* case also gave rise to a number of questions, statements and discussions in the European and Swiss Parliaments about the respective positions of the EEC and Switzerland on the practical application of the FTA competition law. These would also have been a useful source.

As for Article 23 of the FTA, the question of its direct or indirect applicability (see again the *Adams* case and the Sixth General Report of the EEC Commission), the role of the Swiss-EEC Mixed Commission and the relationship between the decisions of the Mixed Commission and the internal law of the parties are issues of practical importance that may have deserved closer attention. This applies also to the problem of concurrent application of Articles 85-86 of the Rome Treaty and Article 23 of the FTA (see the *FIDES* case before the EEC Commission). However, their omission may be justified by the fact that the author intended to treat only the interstate commerce clause in Article 23 of the FTA and not Article 23 as a whole.

Apart from these remarks, the balanced approach and the clear and concise presentation of this study should be emphasized. It has significance not only for the trade relationship between the European Community and Switzerland, but also with respect to a number of other states with which the Community has concluded trade agreements along the lines of the Swiss agreement and which contain a similar interstate commerce clause. Therefore, Braxator's analysis is an important and useful contribution to European competition law and the law of European trade relations.

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*Österreichisches Handbuch des Völkerrechts. Band 1: Textteil. Band 2: Materialien-  
teil.* Edited by Hanspeter Neuhold, Waldemar Hummer and Christoph  
Schreuer. Vienna: Manzsche Verlags- und Universitätsbuchhandlung,  
1983. Vol. 1: pp. xxxv, 467. Index. Vol. 2: pp. xii, 486. Index.

A fundamental challenge in international legal education has been the quest for basic teaching materials whose arrangement reflects a rigorous theoretical perspective but which allow students to appreciate directly the decentralized, frequently informal process of making and applying international law. In the past, Europeans in general preferred treatises as primary teaching tools. However, these days, the traditional American casebook approach, which reflects the conviction that a student's extensive exposure to primary source materials is a necessary ingredient of any basic international legal education, appears to be gaining currency in Europe.<sup>1</sup> The present volumes are evidence of this trend. But rather than adopting the casebook format, they represent an attempt to synthesize treatise and casebook: a first volume, a general treatise of international law, is supplemented by a separate collection of cases and materials. Ample cross-references correlate the text in volume 1 with corresponding cases and materials in volume 2.

The text volume, to which most of the Austrian international law teachers contributed in the form of individual chapters, follows, by and large, a traditional organizational format, except for a lengthy introductory section on contending conceptions of international law (Western, socialist and Third World) and a concluding section on Austria's international status since 1918. Although the present study does not aspire to be, and indeed is not, an encyclopedic treatment of international law, it is clearly more than a mere introduction. Considering its length, volume 1 provides a remarkable amount of detailed information. Some of it is presented in a rather sophisticated way, for example, in the chapter on politically important transnational actors or the section on sources of international law. Each chapter is preceded by a bibliographical note that lists generally pertinent works of international law. However, there are no specific references to literature—supporting or opposing—in the text itself. The editors' overall intention clearly is to create a concise, yet comprehensive, anthology of international legal topics of particular interest to the Austrian law student, as well as to the practitioner. Extensive marginal notes render the text volume a handy source of reference. Success, however, comes at a certain price: some of the points raised get skimpy coverage or are discussed without reference to important historical contexts. For example, there is no reference to the *Iranian Hostages* case in the chapter on state responsibility; and despite references in several passages on extraterritorial jurisdictional claims to pertinent U.S. legislation, there is no mention of the Siberian pipeline controversy.

Volume 2, which provides the supporting documentation for the text, is a veritable treasure trove of primary source materials. Documents are well chosen; cases are introduced by short editorial notes. Unfortunately, most

<sup>1</sup> For an example of an adoption of the casebook approach in Europe, see, e.g., J. MÜLLER & L. WILDHABER, *PRAXIS DES VÖLKERRECHTS* (2d ed. 1982).

of the materials are reproduced in the form of very short excerpts. At times, this quest for conciseness is clearly carried too far. For example, only the first three articles of the Nuclear Non-Proliferation Treaty are reproduced. Yet without consideration of Articles IV–VI, present political and legal challenges to the nonproliferation regime cannot be properly understood. Similarly, many key decisions are represented by only a single paragraph. This has the effect of depriving readers, most importantly, novices, of a sense of the flow of the decision, of the challenge of locating for themselves the legally important passage in a document and thus of an educational experience essential particularly in the international legal context. The editors acknowledge this weakness and the need to resort to the original documents, at least for any in-depth discussion of the issues.

As a basic teaching tool, the “manual” may not entirely resolve the international law teacher’s dilemma. But this fact should not unduly detract from its inherent merits. Despite the large number of contributing authors, the editors have succeeded in presenting a consistent and well-rounded perspective on international law. Although this presentation is especially geared towards taking into account Austrian concerns and interests, it should prove relevant to German-reading international lawyers at large because of both its novel approach and its potential value as a first-line source of reference.

GÜNTHER HANDL

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*Emerging Standards of International Trade and Investment: Multinational Codes and Corporate Conduct.* Edited by Seymour J. Rubin and Gary Clyde Hufbauer. Published under the auspices of The American Society of International Law. Totowa, N.J.: Rowman and Allanheld, Publishers, 1984. Pp. ix, 201. Index. \$38.95.

The subject of this welcome book is the nature and the role of multilateral standards and codes of conduct for international trade and investment in the post-Bretton Woods world. The backdrop is the complexity and interdependence of that world with all its paradoxes and its host of actors with very different socioeconomic perceptions.

In such an environment, a rigidly legalistic approach to promoting trade and investment would not stand much of a chance. On the global scale, the classical prerequisites—a clearly identified mutuality of interests, stable and therefore rational governments, an unambiguous set of principles and the machinery for sanctions—simply do not exist. It was thus widely felt that the new socioeconomic and political realities called for “a new set of rules to govern the way in which trade and investment flowed across national boundaries” (p. 6), the so-called soft international law.

It took long multilateral negotiations among governments to draft such rules, and the involvement of business as well as trade unions was required—something that governments, keen to represent all segments of society, did not always easily accept.

The resulting agreements (the term is something of a misnomer since certain codes are still in the making and may not materialize in the near future) found their expression in rather open-ended statements of principle of a nonbinding nature, reflecting the underlying differences of perception and values. This fascinating negotiation process, the factors working for and against it, the actual or potential impact of the instruments and, to a lesser extent, the new horizons that it opens up are the focus of the book under review. It has been edited by Seymour J. Rubin and Gary Clyde Hufbauer, both of whom bring an enviable combination of erudition, practical experience and elegance of expression to the task. Add to this an array of other highly competent contributors and the result is a compendium that is both enjoyable and essential reading for practitioners and scholars alike in the legal and the economic realm.

Following an informative and interesting analysis by Seymour Rubin of the inadequacies of the Bretton Woods system and its failure to cope with new problems, Detlev Vagts's analysis of the efforts to harmonize company laws within the European Community provides a firsthand illustration of the process of reaching international agreements and the problems of interpreting them. While Vagts notes the limits of the analogy between this process and one aiming at instituting broad international guidelines—European law is perhaps more a matter of federal than international law and more a matter of guidelines than binding directives—he identifies factors that work towards harmonization such as the limited number of countries involved, their close geographic and economic relations, a technical approach to the issues and, more important, a genuine will to cooperate. However, despite these favorable circumstances, problems were encountered in harmonizing company law. Vagts rightly concludes that realism and patience are essential in formulating multilateral instruments of this kind.

The relevance of this conclusion is underlined by the analyses by Lloyd Cutler and Daniel Drory of the work on the UN International Code on Illicit Payments. Here, at least, one would expect a clear commonality of interests among countries, in their stated intent to eradicate corrupt practices in international commercial transactions. In reality, however, the perception of the problem differed among countries and precluded an international agreement. The unilateral measures taken by the United States to eliminate or to combat corrupt practices and the subsequent discussions are interesting and show what can happen when countries resort to independent action in a field where the multilateral dimensions of the problem are obvious. Messrs. Cutler and Drory are on the side of better disclosure practices, as opposed to criminalizing illicit payments through rules that may be hard to enforce. Thus, they favor the principle "sunlight is the best disinfectant" (p. 42). This latter, time-honored principle also played a large part in the work—addressed to both firms and governments—on nonbinding, voluntary codes for transnational corporations, including the OECD Declaration on International Investment and Multinational Enterprises and the UN Code of Conduct on Transnational Corporations. The OECD declaration was adopted as early as 1976 while work on the UN code, initiated in the same year, is still being pursued, more or less vigorously.

The acceptance of the declaration was, of course, facilitated by the homogeneity of interests among OECD governments and the existing balance in their roles as both home and host countries for transnational corporations. The UN code work encompasses a larger number of countries—developed and developing, as well as socialist and market economies—with quite different perceptions of the purpose of a code. Developed countries have tended to concentrate on how TNCs are treated by host governments, including the thorny issue of nationalization, while developing countries, being predominantly host countries to TNCs, worry about how the transnationals behave.

Philippe Lévy notes that the OECD declaration has become a rather effective instrument in guiding the behavior of TNCs, despite the fact that the instrument is not in the corpus of international law. The main reason for this effectiveness is that the declaration was adopted by 24 governments in agreement on specific principles for TNC operations. In this respect—together with the fact that there are follow-up procedures on the OECD declaration in which both corporate and trade union sectors are actively involved—the declaration expresses a common perception of how countries want foreign investors to behave and to be treated. According to Lévy, this expression of will and commonality of interests could in the long run lend a normative character to the declaration. But he concludes that this is a slow, evolutionary process and that further efforts will be needed by the parties concerned to fully reach this goal (*cf.* p. 61).

Thus, while Lévy sees a certain effectiveness in the declaration, he also has reservations. Likewise, it is the element of effectiveness that is the focus of Fatouros's interesting analysis of the UN code. While he notes that real progress has been made—more than half of its paragraphs have already been agreed in the draft form—more work is needed with regard to such important issues as definitions, coverage and scope of application of the code and, especially, the difficult matter concerning the power and authority of host governments vis-à-vis TNCs.

Fatouros underlines that the "establishment of institutional machinery for interpreting and implementing the Code at the international level has great potential significance" (p. 112). At the same time, however, he notes that the lack of any reference in the draft code to the modalities of its interpretation is a serious defect since the "provisions of the Code are formulated in such a manner that, with very few exceptions, they cannot be applied so to speak automatically, without doubts or disputes" (p. 113). This follows also from the fact that the "language is far from specific" (p. 113). Having said this, he concludes that both the interpretation and the application of the code "can be best understood as involving a continuous process of negotiation" (p. 116). Thus, Fatouros's conclusion on the final effectiveness of the UN code is consonant with Lévy's analysis of the OECD declaration.

Another set of codes, including the MTN Subsidies Code, the Implementation of International Antitrust Principles and the Export Credit Arrangements, is also examined. Here it would appear that country interests are relatively homogeneous, while the issues themselves are fairly technical.

The Subsidies Code was adopted, as noted by Daniel Tarullo, despite



"the basic differences among nations over the use of subsidies to productive enterprises" (p. 63). The reason for the success was probably that countries could identify one overriding concern of mutual importance, namely, to avoid a possible trade war in the absence of any agreement at all. Despite this achievement, however, "the agenda of nettlesome issues is length[ening]" (p. 93) only 3 years after this code took effect. At the same time, the very fact that the code has been agreed upon has "established procedures for extensive discussion and mediation to reduce further the corrosive potential of . . . disputes" (p. 93). Thus, the code serves a valuable purpose in defusing incidents that otherwise could lead to serious skirmishes such as, perhaps, the steel cases involving the United States and the EEC.

The Implementation of International Antitrust Principles and other rules on restrictive business practices are, according to Joel Davidow, significant developments in the evolving area of international economic "soft law" (*cf.* p. 112). The success in arriving at an agreement on restrictive business practices can be at least partly explained by the fact that countries were able to agree "that the major single purpose of antitrust rules is to further economic efficiency" (p. 121). But despite this, "major controversies remain, and implementation procedures are still in their infancy" (p. 119) although a certain harmonization of country policies can be expected. Concerning implementation, the UN Secretariat is expected to have an essential role through its "mandates to issue annual reports on antitrust, to study special topics, to gather information, and to form a permanent experts' committee" (p. 135).

On the Export Credit Arrangements, John Moore, Jr. notes the progress made in the framework of meetings of the Berne Union and the OECD Arrangement in ensuring uniform international standards of export credits offered. This work on limiting export credit competition "has relied on negotiation, exchange of information, and the opportunity to match non-conforming offers as 'enforcement' tools" (p. 164). Building on this work, agreement by treaty can eventually follow, but the "parties have been unable to agree on the design, or even the need, for additional sanctions" (p. 164).

As Rubin and Hufbauer point out in their perceptive and analytical concluding chapter, code building has been very much influenced by the fact that it has involved a multitude of countries with very different perceptions of the relevance of and approach towards specific issues. And, importantly, a common feature is that "the code system placed much less emphasis on institution building and committed very little resources to implementing the codes" (p. 177). Therefore, "the laboriously negotiated Codes have resulted in the articulation of evolving practice, rather than in shaping a new system" (p. 177).

One can easily agree with Rubin and Hufbauer that owing to the nature of the codes and of the negotiating process, their effectiveness will largely depend on their interpretation and implementation. In this sense, "[p]rocedure thus becomes a matter of substance" (p. 180). Therefore, the relevance and effectiveness of the various codes lie ultimately less in the basic principles—often of a very general and cloudy nature—and more in

the manner in which they will be interpreted and implemented. Out of this, actual guidelines will eventually emerge. For this reason, it is much too early to pronounce on the overall effectiveness of the codes. One would therefore hope that the matter of effectiveness would in due course be discussed and assessed in another book by those who so competently have contributed to the present one.

It is quite clear already, however, that the very process of code work has had an important and salutary educational effect on all actors: governments, corporations and trade unions (it would be presumptuous to include the above-mentioned distinguished academics and diplomats in this list). And while the work on the UN Code on Transnational Corporations, for instance, has become quite a long process of negotiations—which is not surprising in itself, considering the large number of participants and the complexity of the issues—all participants, most of them probably with sincerity, continue to express their interest in arriving at an effective code.

KLAUS A. SAHLGREN

*Economic Commission for Europe*

*Nation Against Nation: What Happened to the U.N. Dream and What the U.S. Can Do About It.* By Thomas M. Franck. New York and Oxford: Oxford University Press, 1985. Pp. viii, 334. Index. \$19.95.

Professor Franck has written a superbly readable, perceptive and informative book on the United Nations at 40. He succinctly describes what the United Nations is and how it got that way. Franck selects his examples with care and summarizes them extraordinarily well. He delivers fully on the first half of the promise of his subtitle "What Happened to the U.N. Dream and What the U.S. Can Do About It" and makes a few thought-provoking suggestions concerning the future. It should be read by all who have more than a passing interest in the international relations that shape the world in which they live.

Franck's detailed documentation of the extent to which the United Nations was oversold in 1945 and how this overselling contributed to the magnitude of subsequent disillusionment is particularly commendable. If this, like much of the other material in the book, does not strike the informed reader as entirely novel, it is nevertheless exceptionally cogently and crisply enunciated. His historical analysis of U.S. actions in the United Nations, while providing much of which we can feel proud, should also serve as an antidote to any American inclination to self-righteousness. The verbal skill that misleads Franck into some glib and misleading chapter headings such as "Unfulfilled by Unifil" is well harnessed in his chapters on the early overselling, his analysis of how we have contributed to some of our current problems and his extremely sensitive and perceptive chapter on "The Double Standard."

There is no point in attempting to summarize Franck's excellent sum-

maries or to list all the other fine aspects of his book. Read it, but bear in mind some of the caveats and doubts this reviewer will touch on.

Franck's analysis of the United Nations civil service and the growth of the role of the Secretary-General is excellent. These chapters are, however, flawed by Franck's penchant for the well-turned phrase, not to mention the wisecrack and a certain neo-Machiavellianism that happily seems out of character. Wittily informative phrases such as his comparison of U.S. and Soviet behavior ("generally speaking, the Soviets have acted more like insidious termites than like clowns") are too often balanced by aphorisms ("In taking the lead to save Lie, the U.S. believed it was defending the U.N. ideal. In reality, although most Americans did not realize it, the U.S. was merely pursuing a rather parochial self-interest"). One presumes he is referring to the hypocrisy of the collective subconscious. So far as neo-Machiavellianism is concerned, these chapters contain an exhortation by Franck that the United States should ignore the obligations of chapter XV of the Charter since a number of others ignore them. Franck suggests we should do this to protect our interests. He would do well to explore what interests we defend at the cost of which values. Contextual analyses including awareness of the conduct of others as part thereof is one thing; the view that ends justify means is quite another matter. There is also the extent to which respect for the law is profoundly in the American interest as a purely pragmatic matter. Franck was far too ready some years ago to treat Article 2(4) of the Charter as dead (*see* 64 AJIL 809 (1970) and Professor Henkin's rebuttal in 65 AJIL 544 (1971)). Now he would enhance freedom of action by burying Articles 17, 100 and 101 of the Charter.

Franck is somewhat inconsistent on the question of Charter amendment, correctly recognizing at one point that it is not necessary and at another suggesting that it is the only answer. He also fails to recognize the rationale and importance of the amendment to the Charter that expanded the Security Council from 11 to 15 members. In the course of his quips about members wanting to be on the Council so they can play in the big leagues or win a popularity contest, he leaves the impression that the Council was expanded simply to make a few more fools happy. A less flippant approach might have unearthed the more interesting reasons. In 1945 action in the international arena was unthinkable without the active support or at least the concurrence of the major powers, and little else mattered. The Council as then composed could act if the permanent members less China and the European nonpermanent members were willing to let it act. Hence the requirement of seven affirmative votes on a Council of 11 members. By the mid-sixties it was becoming increasingly clear that action by the international organization should for the same reasons require as well the concurrence of at least some of the newly independent states—unified Third World opposition, in other words, was as reasonable a ground not to proceed as a big-power veto. Hence, a Council of 15 as currently composed with the requirement of nine affirmative votes—the major powers and their European allies adding up to eight if we include China. The Charter amendment that increased the size of the Council thus constituted sophisticated fine tuning of the system to enable it better to reflect at least some of the changing realities.

This failure of Franck to see the point is, happily, atypical of the book as a whole. Elsewhere, his perceptiveness and intellectual integrity drive him to admit that the United Nations, while it is not what many hoped for in 1945, has been enormously useful. Why Franck seems to feel the need to obscure this recognition of the utility of the United Nations by a welter of negative comments is another matter. Franck goes on at length to establish the inability of the United Nations to stop aggression if the parties are unwilling or to compel a member to adhere to fundamental principles that conflict with national goals. This is largely true, enormously sad and widely recognized. Franck also notes in passing that the United Nations can police a stalemate, making it more difficult to resume fighting, and can "serve as an excuse for leaders of hostile states not to resume fighting in response to radical domestic pressures." Considering the history of mankind before 1945 and the nature of the states with which we share and have shared the world, it is perhaps more noteworthy that there are such substantial areas of achievement than that the world has not been remade to the extent hoped for in 1945. The development of peacekeeping by interposition is a great achievement and it is uniquely the achievement of the United Nations, including such brilliant international civil servants as Ralph Bunche and Brian Urquhart. To fail to emphasize the importance of this development is as misguided as it would be to treat it as a panacea rather than a palliative. Franck's analysis of U Thant's withdrawal of UNEF in 1967 is prejudiced by his snappy subtitle ("A Self-Inflicted Wound") and his failure to note that a brilliant and shrewdly effective Egyptian diplomat had good reason some years later to pretend Egypt had not kicked UNEF out and caused a war, but rather merely raised a question to which the United Nations could answer as it saw fit. Franck is far nearer the truth when he grudgingly admits, "the Secretary-General may not have had much room to maneuver." Likewise, Franck's analysis of the development of the office of the Secretary-General could have been presented as a success story. It could be described as clear evidence that the existence of the United Nations has enabled the international community to elaborate an institution that is greater than the sum of its parts. Of course, if the world were a perfect place and the Security Council and the General Assembly functioned exactly as intended, there would be less need for the Secretary-General to expand his office. What should be emphasized is that Secretaries-General have been able and, indeed, have been encouraged to contribute to the goals of the Organization and that, all things considered, they have accomplished a great deal. Americans can and should be proud of the role the United States has played in strengthening the office of the Secretary-General. It is a mark of our understanding of the needs of the world in which we live, not of naïveté. Indeed, if one wanted to note naïveté whenever it occurs, one might comment on Franck's swallowing the canard that the United States only discovered how to play "hard ball" in the 1980s. How does he think we won on Puerto Rico before 1982 and kept the Republic of China in place of the PRC so long? It is sad to read Franck sounding like some guru who affects to discover the grave nature of the world we live in.

In light of Franck's oeuvre as a whole, one knows he has not really been

part of that cabal and one can but hope he is not sliding into it. His argument that states need not pay their assessed contributions, with its airy dismissal of the post-1965 U.S. role in enforcing Article 19 of the Charter against member states, is a bad sign of where he may be heading. If there are arguments to support his conclusion, they should be spelled out. The recent Soviet payment, which was sufficient to prevent the USSR from coming under Article 19 on January 1, 1986, is also a significant indicator of the viability of obligations Franck too cavalierly inters. It is all very well that Franck warns that one must not overdo lawbreaking, but even advocacy of moderate lawbreaking comes ill from a law professor, and the notion that it can, over time, be kept moderate at least establishes that he has not become a "realist." Franck also errs when he states that Moynihan's unhelpful speech offending Africans on the eve of the Zionism-racism vote came "after the Third Committee had approved the resolution." The speech in question was delivered on October 5 and the vote in the Third Committee took place on October 17. For the rest, his discussion of the Zionism-racism issue is up to Franck's usual very high standard of accuracy and perceptiveness.

With regard to future prospects, Franck's suggestion of a league of the like-minded as a possible replacement for the United Nations ignores the reasons NATO has not developed in this manner already: the fact that such a league would not fill the need for a universal forum for harmonizing differing views, the finite intellectual and physical resources that would need to be divided between the league of the just and some form of global organization and at least some of the lessons of the failure of the League of Nations. Franck also fails to state explicitly the perception that occasionally shines through in various places in the book that playing hard ball is only part of what is necessary. Having and causing others to realize that you have a decent respect for their concerns and needs is an essential addition to playing hard ball. Still, one should not be too harsh on Franck for his failure to contribute more by way of future policy. His analyses of what has occurred are first-rate, and even the great Harold Nicolson was far better at explaining what had happened than at making *in futuro* suggestions or predictions.

In sum, Franck has written a very fine book, even if it contains a few unpalatable views and a relatively minor error or two.

ROBERT ROSENSTOCK\*

*United States Mission to the United Nations*

*Human Rights in International Law: Legal and Policy Issues.* 2 vols. Edited by Theodor Meron. New York: The Clarendon Press; Oxford University Press, 1984. Pp. 566. Index in vol. 2. \$42/vol., cloth; single-vol. paper ed., £17.50.

Editor Theodor Meron has set a formidable goal for this two-volume work: "to provide teachers and students not only with a textbook covering the principal human rights areas, but also with pedagogical suggestions, syl-

\* The views set forth herein are exclusively those of the writer and do not necessarily reflect those of the Department of State.

labi, bibliographies, and case studies" (preface). He has assembled a prestigious array of international human rights experts to address major issues of definition and implementation of human rights law at the global and regional levels.

Beginning with chapter 2, each chapter is presented in a common format of "Legal and Policy Considerations" (by far the most important section), "Teaching Suggestions," "Syllabus," "Minisyllabus," "Bibliography" and "Minibibliography." The usefulness of the syllabi varies widely, and most are essentially outlines of the chapters themselves. The "mini" versions of syllabi and bibliographies are of slight value, except where the former present a more detailed outline of a specific segment of the chapter topic which might be used as a classroom case study.<sup>1</sup>

While every collection of individually authored chapters has some (often welcome) diversity, the wide range of approaches found here makes it difficult to decide whether the whole is indeed a "rich menu" (p. 5) (even of the Chinese one-from-column-A, one-from-column-B variety) or a less traditional potluck supper. Given the book's goal to serve as a text, one might have hoped for greater discussion of the problem-case study approach versus the more traditional lecture course, or the relative pedagogical merits of substantive versus procedural emphasis. While some of these issues are addressed in Meron's introductory chapter, it does not seem enough merely to suggest that "[i]t is up to them [teachers, students and practitioners] to pick and choose among the materials" (p. 24).

The diversity of style and content is perhaps best illustrated by the final two chapters, which deal respectively with the inter-American and European human rights systems. While their different approaches reflect to some extent differences in the two regional systems considered, the procedural-theoretical emphasis of one and the political-jurisprudential emphasis of the other would make comparison of the two systems difficult for the inexperienced teacher or student.

The chapter on the inter-American system, by Thomas Buergenthal, raises some provocative legal issues of interpretation and is scholarly rather than pedagogical. The priority given to the largely untested Convention-based system, which entered into force only in 1978, and the theoretical problems it raises seems somewhat misplaced, as the quasi-political activities of the Inter-American Commission on Human Rights are likely to remain the most significant aspect of the system for protecting human rights in the Americas in the foreseeable future. The chapter is almost exclusively procedural, perhaps in recognition of the fact that the substantive jurisprudence of the Commission and Inter-American Court of Human Rights fades in light of the reality of the gross violations with which they are faced.

Rosalyn Higgins's chapter on the European Convention on Human Rights could not be more different: it reads almost like a teacher's manual and discusses in detail the substantive law of the European system in the areas of torture and ill-treatment; some rather technical aspects of detention, the

<sup>1</sup> *E.g.*, the chapters by Lillich, Trubek and Higgins.

definition of a "court" and the content of a "fair trial"; and freedom of speech. Her case studies offer a valuable, if selective, summary of European jurisprudence, although one wishes that the author had been more forthcoming in explaining her own criticisms of certain decisions, which are mentioned only in passing (e.g., at pp. 525 n.148, 531, 534). In contrast to Buerghenthal, Higgins emphasizes the political context of the European system, although the distinctions drawn between the civil and political rights protected by the European Convention and the economic, social and cultural rights proclaimed in the Universal Declaration of Human Rights and elsewhere are somewhat overbroad.<sup>2</sup> Nevertheless, the chapter as a whole does provide the prospective teacher with an excellent overview and a detailed summary of several areas of European human rights law that the nonexpert would otherwise find it difficult to obtain.

Returning to the chapters in the order in which they are presented, that by Louis Henkin on "International Human Rights and Rights in the United States" is largely a reprise of his earlier articles on this topic. It remains a very good introduction to international human rights, particularly for the typical American law student who lacks any international background; it also offers a good syllabus and a brief discussion of pedagogical options for the prospective teacher.

Chapter 3, "The Jurisprudence of Human Rights," by Jerome J. Shestack, is perhaps the most valuable of this two-volume work, in that it presents a philosophical survey of theories of rights and justice not to be found in any other work devoted primarily to international human rights law. To this admittedly unknowledgeable reviewer, the necessarily brief summaries of traditional theories of rights (e.g., natural rights, positivism, Marxism) and more modern theories of justice (e.g., Rawls, Cahn, McDougal, Dworkin) are both clear and provocative. While the chapter can stand alone if the philosophical seasoning of a human rights course is to be light, the syllabus and bibliography offer sufficient guidance for a much more profound discussion if teachers or students so desire.

Shestack's reminder that "it is often easier to bring something about if we understand clearly what it is we are trying to do" (p. 105) is important to law professors as well as to nongovernmental organizations (NGOs) and human rights activists. However, philosophy rarely leads immediately to clarity, and one might consider assigning this chapter at the end rather than the beginning of an introductory human rights course, perhaps as part of a discussion of the role and priorities of NGOs. In any event, the questions do need to be asked.

The next two chapters, "Civil Rights," by Richard B. Lillich and "Political and Related Rights," by John P. Humphrey, offer very good expositions of

<sup>2</sup> For example, it is certainly an overstatement that "[t]he dilemma is that the full achievement of those economic and social rights [in the Universal Declaration] entails a loss of individual liberties which is unacceptable to the western liberal democracies" (p. 497). As is recognized by the author, Protocol No. 2 to the European Convention proclaims at least the right to education, and the impact of the European Social Charter on economic rights in Europe also should be noted. See generally D. HARRIS, *THE EUROPEAN SOCIAL CHARTER* (1984).

an extremely wide range of substantive law. The former is analytical and jurisprudential, providing a "nutshell" version of longer works such as those by Henkin<sup>3</sup> and Sieghart,<sup>4</sup> which are too comprehensive for an introductory or survey course on human rights. As would be expected from the coauthor of a leading course book on human rights,<sup>5</sup> Lillich offers several valuable teaching suggestions as to how one might deal with such a vast amount of material.

Humphrey's chapter is more historical, although the contemporary content of freedom of conscience, expression, assembly and association is discussed, along with briefer consideration of the rights to participate in government and to self-determination. The separation of the "civil rights" of chapter 4 and the "political and related rights" of chapter 5 seems designed to avoid overburdening any single author rather than to suggest any major conceptual distinction, although Humphrey appropriately distinguishes individual freedoms from true "group rights" such as the right to self-determination. In the latter category, one might have wished for a more detailed discussion of the rights of minorities and indigenous peoples, which are of increasing political importance and growing relevance to the development of international law,<sup>6</sup> but the brief outline of self-determination issues could serve at least as a starting point.

Humphrey's passing reference to majority versus minority rights (p. 173) echoes questions raised by Shestack under the rubric of the tension between liberty and equality (p. 85), and this, too, is a fruitful subject for further investigation. Demands for autonomy or self-government underlie conflicts from Sri Lanka to Spain, and the balance to be struck between individual rights and the welfare of the community is too often addressed in an overly polemic manner by advocates for both constituencies.

David Trubek's chapter on "Economic, Social, and Cultural Rights in the Third World" is the longest in the book and perhaps the most controversial. Its purpose is to describe what Trubek terms "the international law of social welfare" (p. 206) through discussion of the "programmatic obligations" (pp. 206-07) of states under the Covenant on Economic, Social and Cultural Rights (ECOSOC Covenant). The chapter focuses on the role of the United Nations specialized agencies (primarily the International Labour Organisation (ILO), with a brief section on the World Health Organization (WHO)) in defining and implementing the Covenant and encouraging appropriate national social welfare programs.

<sup>3</sup> THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS (L. Henkin ed. 1981).

<sup>4</sup> P. SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS (1983).

<sup>5</sup> INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY (R. Lillich & F. Newman eds. 1979).

<sup>6</sup> Cf., e.g., the work of the Working Group on Indigenous Populations of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (whose most recent report is contained in UN Doc. E/CN.4/Sub.2/1984/22); and the revised draft declaration on the rights of minorities, UN Doc. E/CN.4/Sub.2/L.734, and the continuing work of the relevant working group of the Commission on Human Rights (whose most recent report is contained in UN Doc. E/CN.4/1985/65).



Trubek's approach is open to several theoretical and substantive objections, although it does seek, justifiably, to place the discussion of social welfare rights in a realistic context. The limitation to the Third World "because Third World development is a priority goal" (p. 208) unfortunately perpetuates the myth that economic-social-cultural rights need not be of particular concern to the Western or socialist world, despite the fact that massive unemployment, inadequate distribution of basic health care and marginal education in developed countries cannot be excused by lack of resources. Trubek's "social welfare rights" come perilously close to not being rights at all, and his thesis that they must be considered in a wholly different light from civil and political rights seriously underestimates the programmatic content of the latter while overstating the macroeconomic and development component of the former.<sup>7</sup> This obscures the more important point that the ECOSOC Covenant does impose on states "an obligation to give some priority to social welfare" (p. 222).

The differences between civil-political rights and social welfare rights (a term which unfortunately excludes very real and much threatened cultural rights entirely) are consistently overemphasized. While it is accurate to note the differing political perceptions that led to the adoption of two separate human rights covenants in 1966, in practice, states have almost universally accepted the legitimacy of both sets of rights.<sup>8</sup> The explanation of the "generic implementation" envisaged in the ECOSOC Covenant (pp. 217-19) greatly overstates the role of the specialized agencies,<sup>9</sup> and the appropriate criticism of the limitation to "general recommendations" by the Economic and Social Council on reports submitted to it under the ECOSOC Covenant (pp. 218-19) neglects to mention the similar restriction to "general comments" imposed on the Human Rights Committee under Article 40 of the Covenant on Civil and Political Rights. There is certainly no support for the conclusion that "only general recommendations *which deal with positive measures* to increase international efforts to foster social welfare" are permissible under the ECOSOC Covenant (p. 219, emphasis added). The specialized

<sup>7</sup> For example, the right to a fair trial or even the prohibition against torture requires far more for its implementation than "passing laws and revising constitutions" (p. 211), and it is difficult to see how distinguishing resources needed to maintain a judicial system or effective law enforcement from those required to institute an educational system advances our understanding of the problem.

<sup>8</sup> Of the 79 state parties to the ECOSOC Covenant as of September 1983, only Honduras, the Philippines and the Solomon Islands had not also ratified the Covenant on Civil and Political Rights; all parties to the latter also are party to the former. Human Rights International Instruments, UN Doc. ST/HR/4/Rev.5 (1983).

<sup>9</sup> This point seems to be subsequently conceded in the more specific discussions of the ILO and WHO: "[T]he observations [of the ILO on state reports] fall short of what one might hope for, given the central role the ILO necessarily must play under the Economic Covenant" (p. 241). "[T]he WHO has not sought to use these principles [of Primary Health Care] as standards to measure country progress under the Economic Covenant" (p. 244). Cf. Fischer, *International Reporting Procedures*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 165, 176 (H. Hannum ed. 1984): "[I]t is perhaps not surprising that they [the specialized agencies] have not yet contributed to implementation of the [ECOSOC] Covenant's reporting system. Officials of the agencies know there would be strong resistance if they tried to force the issue."

agencies are not "authorized to report" to the Economic and Social Council on a state's implementation of the Covenant (p. 220); rather, "the Economic and Social Council *may make arrangements* with the specialized agencies in respect of their reporting to it on the progress made" in implementing the Covenant.<sup>10</sup>

Other questionable observations tend to detract from the valid points made with respect to the weakness of international implementation machinery in the area of economic, social and cultural rights, as well as the essential role of a wide range of actors in implementing them. The statement that "[m]ore precise standards must be developed before it is possible to determine if states are meeting the obligation under the Economic Covenant to progressively realize the rights they have recognized" (p. 245) surely underestimates the relative clarity of the provisions on, for example, a state's obligation to provide free primary education (Art. 13 of the Covenant), the prohibition against gender discrimination in wages (Art. 6), freedom of choice in employment (Art. 6) and the right to take part in cultural life (Art. 15).

These criticisms are offered in recognition of the seriousness of the issues and of Trubek's approach to them, even if this reviewer may have major disagreements with the latter. However, this is the only chapter devoted to economic, social and cultural rights in these volumes, and neither teacher nor student is provided a sufficiently clear framework in which the issues raised can be profitably discussed. This chapter would be a provocative law review article, but its approach does not seem appropriate, given the stated goals of the book.

With the exception of the two chapters on regional human rights machinery discussed above, the chapters in volume II generally deal with secondary, if nonetheless important, issues in the human rights field. The chapters by Francis Wolf on "Human Rights and the International Labour Organization" and Jack Greenberg on "Race, Sex, and Religious Discrimination in International Law" are clear, expository pieces. The former focuses on ILO procedures designed to protect human rights rather than on the substance of relevant rights or the ILO's effectiveness; the brief syllabus is very good. The Greenberg chapter is largely textual (describing the relevant provisions of the UN Charter, the Universal Declaration, the two Covenants, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women and the Declaration on Religious Intolerance), and it contains some excellent teaching suggestions and useful comparisons of international norms with U.S. practice.

Yoram Dinstein's chapter on "Human Rights in Armed Conflict" is rather cursory and contains little discussion of the substance of humanitarian law or the law of war, although the two-page description of "the essence of human rights in armed conflicts" does offer a succinct summary (pp. 348-50). His comparison of "normal" peacetime human rights with those rights protected in armed conflicts is of interest and could serve as the basis for a

<sup>10</sup> ECOSOC Covenant, Art. 18 (emphasis added).

broader classroom discussion of the relationship between humanitarian law and more modern concepts of human rights law.

Louis B. Sohn's chapter on the United Nations role in implementing human rights includes brief discussions of reporting and complaint procedures for individuals and states, including those of the ILO (again!), UNESCO and the American and European systems. Some analysis of the effectiveness of the various procedures is given, together with imaginative suggestions such as the establishment by the General Assembly of a fact-finding and conciliation commission that could consider interstate human rights disputes if no other mechanism were available, or the consolidation of the reporting systems under the two Covenants. Most observers would agree with Sohn's conclusion that the procedure for the consideration of confidential communications under ECOSOC Resolution 1503 "is not working satisfactorily" (p. 391), although many would offer a more positive assessment of the value of public discussions of human rights violations under ECOSOC Resolution 1235 in the Commission on Human Rights and its Sub-Commission.

The most frequent users of the UN machinery for the protection of human rights described by Sohn (indeed, of most of the procedures described in these volumes) are the nongovernmental organizations that are the subject of the chapter by David Weissbrodt. Copiously footnoted, the chapter offers a good overview of NGO activities for those with little or no previous knowledge of them. While a bit too much attention may be focused on minor issues, the teaching suggestions and syllabus are very helpful; certainly, the role of NGOs in attempting to enforce international human rights norms is in many instances as important as that of many intergovernmental organizations, even if that role is primarily one of documentation and persuasion rather than litigation or direct confrontation.

Even this relatively brief survey of *Human Rights in International Law* indicates the breadth of coverage in these two volumes. While it may be a somewhat unusual criticism, the primary difficulty in using the work is that it succeeds too well in offering too many approaches to too many audiences. Part student text, part teacher's manual, part law review article, the end result is a gourmet meal with such varied spicing that one hardly knows where to begin. Despite the editor's laudable efforts to instill consistency through imposition of a single format, some may find the whole less than the sum of its parts.

*Human Rights in International Law* may be more valuable in a nonacademic context, as those with an interest in the subject matter of a particular chapter are likely to find much of value. In particular, the chapters by Shestack, Lillich, Greenberg and Higgins offer material that is not available in similar form elsewhere. Whether or not they become the standard course books in law schools or human rights institutes, these two volumes do constitute a worthy addition to human rights teaching and scholarship, a smorgasbord that will richly reward the selective taster.

HURST HANNUM

*Procedural Aspects of International Law Institute*

*International Covenant on Civil and Political Rights, Human Rights Committee: Selected Decisions under the Optional Protocol (Second to sixteenth sessions), UN Doc. CCPR/C/OP/1 (1985). Pp. v, 167. Index. UN Sales No. E.84.XIV.2. \$16.50.*

The Optional Protocol to the International Covenant on Civil and Political Rights does not address the question of publication of the "views" (decisions) adopted by the Human Rights Committee (established under Article 28 of the Political Covenant) on communications from individuals claiming to be victims of violations of rights set forth in the Covenant. Article 5(4) of the Optional Protocol requires only that the Committee forward its views to the state party and to the individual concerned. Fortunately, the Committee decided (1979) that the Protocol did not preclude publication of the "views" and that such publication was desirable. The Committee first published one such "view," in a form available to the general public, in its annual report to the 34th session of the UN General Assembly (1979) (since the Assembly's 33d session, the annual reports of the Committee have been published as Supplement No. 40). Ever since, the practice of publishing the decisions of the Committee in its annual reports to the General Assembly has continued, in greater numbers. The report submitted to the 38th session (1983) of the General Assembly thus contains 17 "views" and seven decisions on inadmissibility. The report submitted to the 39th session (1984) of the General Assembly contains seven views and three decisions on inadmissibility.

*Selected Decisions*, the volume under review, covers the second to the 16th sessions of the Human Rights Committee, that is, the period paralleling the reports that it submitted to the 32d through 37th sessions of the General Assembly (1977-1982). These annual reports contain altogether 31 views of the Committee, one decision to discontinue consideration and one decision on inadmissibility. *Selected Decisions* contains the same 31 decisions on the merits ("views" adopted under Article 5(4) of the Optional Protocol), but it presents them in one easily available volume, a matter of considerable importance, especially for those libraries that do not possess a complete set of Supplement No. 40. Moreover, *Selected Decisions* facilitates research by presenting, in annexes, a list of states parties to the Optional Protocol, a statistical survey of communications, an index by articles of the Political Covenant and an index by articles of the Optional Protocol, as well as a subject index. *Selected Decisions* is thus an important and welcome addition to the documentation on human rights activities of the United Nations and on the practice of the Human Rights Committee, an essential source for interpreting the Political Covenant and the Optional Protocol. The publication of the second volume, covering additional sessions of the Human Rights Committee, will be eagerly awaited.

*Selected Decisions* presents, however, only a limited picture of the practice of the Committee. Aside from the decisions on the merits adopted during the period concerned (31), the volume contains only a fraction of the decisions declaring a communication admissible, inadmissible or partly admissible (21), of those discontinuing or suspending consideration (4), and of the

interlocutory decisions prior or subsequent to admissibility decisions (11)—in all, 67 decisions including the 31 “views.” Generally, only the text of the latter is given *in toto*. In contrast, during the same period, as many as 249 formal decisions were adopted by the Committee, including 36 decisions declaring a communication inadmissible, discontinued or suspended, and 54 declaring a communication admissible.

Decisions on admissibility or inadmissibility are of particular importance and merit full inclusion in future volumes, even if it is necessary to omit identification of the parties. Fortunately, the initial practice of the Committee of hardly ever publishing such decisions has already given way to a more liberal policy, as evidenced by recent annual reports to the General Assembly and by the *Selected Decisions*. In its annual reports to the 35th (pp. 88–93) and 39th (pp. 110–26) sessions of the General Assembly, the Committee has presented important information about its consideration of communications submitted under the Optional Protocol, e.g., on the standing of the author of a communication, on qualifications of the victim, on who may be considered to be subject to a state party's jurisdiction for purposes of Article 1 of the Optional Protocol and on its practice under Protocol Article 5(2)(a) (examination of the same matter under another procedure of international investigation or settlement) and Article 5(2)(b) (exhaustion of domestic remedies). Students of international human rights cannot, however, regard this information as an acceptable substitute for the text of the actual decisions, which can better elucidate not only the interpretation and application of the Optional Protocol, but also, at times, the provisions of the Political Covenant itself and the Committee's understanding of the reach of the parties' substantive obligations under it.

THEODOR MERON  
*Board of Editors*

*International Chamber of Commerce Arbitration.* By W. Laurence Craig, William W. Park and Jan Paulsson. New York, London, Rome: Oceana Publications, Inc.; New York: ICC Publishing, 1984. Loose-leaf in 2 binders, \$100/binder; single vol. ed. \$75, cloth.

On a par with the certainty of death and taxes is the certainty of disputes in transnational business. In transactions involving entities of diverse nationalities, each is frequently reluctant to submit possible disputes to the courts of the other party and each may be reluctant to repair to the national courts of a third state. A frequent alternative option is private international arbitration. Ad hoc arbitration recommends itself because of its maximum suppleness; parties may shape it as they wish. But suppleness is not without its costs. The moment arbitration of differences is required is almost by definition the one of greatest dissensus; the absence of an existing machinery to which recourse is available requires the creation of a procedure at a most inopportune time and constitutes one additional obstacle to the resolution

of the dispute. Hence the contemporary proliferation of institutionalized procedures for arbitration.

The ICC, with headquarters in Paris, would appear to be the premier institution for international commercial arbitration. For the past several years, it has averaged more than 200 international cases per year, compared with some 120 per year by the American Arbitration Association. The London Court of Arbitration and the International Centre for Settlement of Investment Disputes (the last admittedly a different type of entity) are in distant third and fourth places. The sums at stake are far from trivial. In 1981 and 1982, 154 of the cases submitted to the ICC court involved disputes in excess of \$1 million, 41 of these in excess of \$10 million. At least three since 1979 involved more than \$1 billion. ICC arbitrations may take place anywhere in the world the parties desire; wherever they occur, they benefit from a variety of services provided by a secretariat based in Paris.

Not only private entities engage in ICC arbitration. Governments and their agencies and instrumentalities also appear; a signature on a contract including an arbitration clause is held to constitute a waiver of immunity of jurisdiction in the United States and a number of other forums. This makes the phenomenon of ICC arbitration pertinent even to the conventional public international lawyer. And its Paris headquarters notwithstanding, ICC arbitration is important for American lawyers. Since American businessmen were largely responsible for the creation of the ICC and American entities are a frequent litigant before it, the appearance of this comprehensive treatise on ICC arbitration in English by three American international lawyers is an event of signal practical and scholarly importance.

Craig, Park and Paulsson divide their work into six major parts, 38 chapters and six appendixes, one of them a statistical analysis of composition of ICC entities, controlling for variables such as nationalities of arbitrators, parties, regions and loci, amounts in dispute and fees and costs. Part I of the treatise deals with the institutional framework of the ICC. Chapter 1 reviews its general characteristics. Chapter 2 sets out the organizational framework of the ICC, treating in some detail the relationship between the ICC and its national committees, the role of the Paris-based "court," the secretariat and the arbitrators. Chapter 3 deals with costs. Part II treats the agreement to arbitrate and is composed of six chapters. The first chapter is a summary review of types of arbitration agreements. The second chapter is a more ambitious examination of the problems associated with their validity: capacity of the parties, authority to represent them, autonomy of the arbitration clause, law applicable to the arbitration agreement, form, arbitrability, incorporation by reference, related but nonsignatory parties, related but nonincorporated agreements and multiparty disputes. The next two chapters present, in straightforward fashion, elements of arbitration agreements that the authors believe are either indispensable, recommended, occasionally useful or pathological.

Parts III and IV of the treatise deal with the actual arbitration process. Part III is primarily concerned with the establishment of the tribunal and the special role of the ICC's court of arbitration. Chapter 11 examines in

detail arbitral jurisdiction. Chapter 12 focuses on the constitution of the tribunal and the determination of the place of arbitration. Chapter 13 explores disqualification of arbitrators or their incapacity. Chapter 14 briefly treats the issue of deposit for costs. Chapter 15, in more detail, examines the important problem of "Terms of Reference," by which the parties establish the material boundaries of the arbitration. Chapters 16 and 17 examine, respectively, rules governing the proceeding and the choice of substantive law. Related to that, chapter 18 examines the potentials and contingencies for "amiable composition." Chapter 19 deals with arbitral awards and chapter 20 with the ICC court's role in scrutinizing them. Chapter 21 treats the determination of costs and the final chapter in this section, the entry into effect of the award.

Part IV focuses, in much greater detail, on specific phases of arbitration that a practitioner must master: fact-finding in written proof and arguments; hearings, including power of subpoena; party experts and oral argument; fact-finding; interlocutory measures of arbitrators and ancillary proceedings before national courts.

The term "international arbitration" is somewhat misleading. All ICC arbitration necessarily takes place entirely within national systems. It depends perforce for its effectiveness on tolerance by, as well as assistance from, those national systems. Craig, Park and Paulsson treat this aspect of international arbitration in detail in part V. In the first chapter of this part, they examine the different features of the potential national envelope in which a particular arbitration may take place and alert the practitioner to key features of national law that must be examined in order to see whether or not a particular jurisdiction discriminates in favor of one party or the other or whether it is generally desirable for the arbitration planned. The next six chapters are composed of detailed examinations, as they pertain to international arbitration, of, respectively, English, French, Swedish, Swiss (Canton of Geneva), United States and Hong Kong law. Each of these comparative law essays is a model of lucid and concise presentation, with a constant focus on the relevance for the practitioner and scholar of statutory and judicial attitudes toward arbitration. Curiously, for a book in English and in the American legal idiom, there is an annex entitled "U.S. Civil Procedure for the Non-U.S. Lawyer," but no counterpart introduction to civil law procedure for the U.S. lawyer.

Part VI deals with selected major trends in international commercial arbitration: the emergence of *lex mercatoria* or international business law; state contracts, including the effect of the "New International Economic Order" on international arbitration; sovereign immunity; act of state; and the impact of the 1958 UN Convention on Recognition and Enforcement of International Arbitration Agreements and Awards, the European Convention of 1961 and the Brussels Convention on Jurisdiction and Judgments. The final chapter reviews additional ICC dispute-resolving mechanisms: conciliation, technical expertise, "arbitration referee," adaptation of contracts, maritime arbitration, specialized commissions and so on. In addition to the statistical appendix already mentioned, other appendixes set out ICC Rules of Con-

ciliation and Arbitration, including the Statute and the Internal Rules of the Court of Arbitration, which have only recently become publicly available, Rules for Technical Expertise, Adaptation of Contracts and Maritime Arbitration, illustrative awards, synopses of national judicial decisions and illustrative terms of reference and procedural orders.

Even this cursory review of Craig, Park and Paulsson's treatise demonstrates that there is nothing in English that can compare to it for comprehensiveness and depth of treatment. The writing is lucid and concise and the statements of the law are scientific, in the best legal sense. Where matters are in decay, in flux or as yet unclear, the authors do not hesitate to say so. Part of the literature in English on arbitration has an avowed missionary character. But here the writers' commitment to arbitration as a valuable modality for business and international order is always tempered by a critical scientific dispassion. The book is also a model of courteous collaboration between equals: *pars in parem non habet jurisdictionem*. There are a number of instances in which the authors acknowledge some disagreements among themselves as to the validity or worth of certain decisions they review. The range, quality and precision of the comparative work is striking.

This reviewer did encounter a number of judgments on which he was uncertain or disagreed. The authors' inimitable familiarity with ICC awards and their frequent incorporation of them in the text may cumulatively have created the impression of a more homogeneous and consolidated corps of arbitrators with common perspectives than actually exists. It is important to bear in mind that, despite the institutional continuity of the ICC, the arbitrators themselves frequently tend to be ad hoc recruits, most of whom are unfamiliar with the previous decisions of other arbitrators. Each case is frequently an idiosyncratic synergism of national, international and ICC norms. Moreover, much of this jurisprudence is not published. (Indeed, some authorities believe it should not be.) In this respect, one can refer to the aggregate production of the ICC as a "case law" only metaphorically. While this treatise, by virtue of its methods and results, may change that fact (others have tried but do not appear to have succeeded), it would appear too early to conclude that the qualitative transformation has taken place.

The authors' admiration for *lex mercatoria*, though restrained, did not persuade this reader. In the absence of a firm and articulated set of policies and rules at lower levels of abstraction to which international arbitrators may have recourse, *lex mercatoria* often becomes either (1) an invitation to exercises of broad arbitral discretion, approaching decision *ex aequo et bono* without even the merit of admitting it, or (2) a device by which corporate entities seek to supplant the legitimate policies of territorial communities, under the camouflage of an essentially vacant, if not meaningless, Latin term. For parties from different legal and business cultures who wish to have some certainty of expectation about the criteria to be applied to their decision, *lex mercatoria* may often come perilously close to a crap shoot and could well deter submission to arbitration. For states, *lex mercatoria* may ultimately turn the relatively benign attitude of Western governments toward arbitration back to the traditional hostility.



States should not be viewed as the "bad guys" here. National jurisdiction exists to protect the legitimate interests of the community concerned. That is the *raison d'être* of the apparatus of the state. It is well to remember that so-called international transactions take place in and affect states; the term "international" or "transnational" arena is a metaphysical abstraction. It is reasonable to ask governments to yield *judicial* jurisdiction when the parties manifest national diversity, when they wish, for licit reasons, to privatize the adjudication and when those procedures, including choice of law, are reliable. It is—in my view—unreasonable to ask governments to surrender the application of their law and policy to matters that affect them vitally because the parties or arbitrators wish it and sanctify themselves with an obscure Latinism.

As is inevitable in a book that seeks to cover as much as this one, some subjects are treated with great brevity. The authors' treatment of dissenting opinions is tantalizingly short. More light should be thrown on a subject that is conceived of in such radically different ways in different legal cultures. The treatment of the demise of the Calvo Clause and the reasons for it appear to oversimplify a more complex need for some areas of national competence immune to international review. The District of Columbia District Court decision in the *LIAMCO* case,<sup>1</sup> which was settled shortly before appeal was handed down, appears to this reviewer not to be representative of U.S. jurisprudence on this matter.

The authors, like many who write on international arbitration, are happy to have national courts compel arbitration but tend toward a cool view of the role of national courts in reviewing international awards. That view, I believe, is based on an anachronism: the image, long obsolete, of national courts as the "enemy," jealous of their jurisdiction and hostile to any "ouster," seeking to intervene in arbitrations at every opportunity and to impose their own "views" as opposed to the "views" of the parties. International arbitrations taking place in the industrialized states of the West may increasingly rely upon sophisticated judges, tolerant and supportive of arbitration and willing to limit themselves to a largely supervisory function which, because of its restrictive scope, need not unduly prolong arbitration. It appears that the time has come for a reappraisal of this function and a recognition that, rather than being pathological, the contingency of national review is an important control mechanism on the probity and legal accuracy of ICC arbitration. Not only does it not undermine international arbitration, but it may ultimately help it better to serve its constituents. Certainly, when foreign parties choose a jurisdiction that has a broad review competence (e.g., Switzerland under Article 38 of the Concordat), it is reasonable that they should be assumed to have voluntarily adopted the control function of cantonal and federal courts there provided.

In this massive, clearly organized, scrupulously researched and lucidly written book, these are the most minor and idiosyncratic of cavils. Craig,

<sup>1</sup> *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahiriya*, 482 F.Supp. 1175 (D.D.C. 1980), *vacated*, 684 F.2d 1032 (D.C. Cir. 1981).

Park and Paulsson have produced a *vade mecum* for international lawyers and legal scholars. Like John Bassett Moore's *History of International Arbitration*, the book under review not only effectively describes and analyzes an important phenomenon but may well transform it into something different and better.

W. MICHAEL REISMAN  
*Board of Editors*

## BRIEFER NOTICES

*Les Communautés Européennes dans l'Ordre International.* By Jean Groux and Philippe Manin. (Luxembourg: Office des Publications Officielles des Communautés Européennes, 1984. Pp. 166. In French and German.) This concise work by two distinguished French experts on European Community questions faces the challenging objective of defining the role to be assigned to the Community in the international order. The book is divided into three parts: the insertion of the EC into international relations, its participation in treaties and other international legal acts, and the EC and the application of international law.

Part 1 deals with international recognition of and by the EC, international representation of the organization and accession and participation of the EC in the labor of international organizations and conferences. Part 2 examines the differences between Community and mixed agreements and their respective convenience, the right of the EC to be party to a treaty—and the various ways of according the EC the quality of contracting party—as well as the participation of the EC in institutions designed to guarantee the real application and management of international agreements to which the EC is a party. A certain amount of attention is paid to the role played by the EC in the making, adoption and development of acts of international organizations and conferences. Part 3 is mostly dedicated to the application of international law by the EC organs, but also to the matter of international responsibility, particularly in the light of the experience of other international organizations, and to the friendly settlement of disputes within the domain of the EC competencies.

Overall, the book represents a valuable contribution to the study of the position of such a peculiar international organization on the world scene. The authors take a prospective view and detect certain difficulties in adjusting the needs and aims of the EC at the international level to the status acknowledged for it by many third states (the refusal of the USSR to recognize the EC is emphasized) through mainly commercial ties. The specific supranational nature of the EC justifies the distinctive treatment it should receive from the other members of the international community. At the same time, that special character of the organization explains the innovative external action the EC is already deploying. A limited but adequate bibliography is included.

ALBERTO M. HORCAJO  
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*International Business Transactions in a Nutshell* (2d ed.). By Donald T. Wilson. (St. Paul: West Publishing Co., 1984. Pp. lxxiii, 462. Index. \$11.95.)

The author's description of his book as "modest," matched with the fact that the first edition was reviewed in the Briefer Notices section, might otherwise suggest a lackluster book. Donald Wilson's *International Business Transactions in a Nutshell (IBTN)*, however, does not fit into the suggested mold. Absence of a readily available or recent casebook (Little Brown, Foundation Press and West will each publish one by early 1986) points to the practicalities of using *IBTN* as a basis for law school courses and as a succinct restatement of the law to which practicing lawyers can resort for reliable guidance.

The introduction preserves the first edition's 1976-1980 snapshot of the world trade landscape, projected in juxtaposition with the period from 1981 to 1983 to reflect significant developments in each frame. The second edition has a familiar feel in terms of day-to-day and long-term operations involving import-export entities, governments and international organizations. The author has fortunately retained the last chapter, involving negotiating and renegotiating a written agreement.

The most extensive change is found in the chapter on the Foreign Sovereign Immunities Act of 1976. It incorporates the deluge of significant cases decided since publication of the first edition. The material addressing letters of credit has tripled, accompanied by a substantial expansion of export-import control coverage. Otherwise, there are comparatively minor changes that update the excellent survey presented in the first edition.

The second edition's extended preliminary outline, more generous provision of textual authority and protracted subject index all complement the varied needs to digest a capsule introduction to the legal and practical aspects of an international business transaction or to extract a component of a larger unit.

Throughout this *Nutshell*, Professor Wilson demonstrates an acute understanding of when to particularize and when to generalize. *IBTN's* treatment of a burgeoning field affected by threatened trade wars is destined to become, if it has not become so already, the primer for ready reference to more complex information as desired.

WILLIAM R. SLOMANSON  
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*World Development Report 1985*. Published for The World Bank. (New York: Oxford University Press, 1985. Pp. xii, 243. \$20, cloth; \$9.95, paper.) This *Report* appears at first glance to be merely a useful compilation of statistics. However, a closer look reveals three other elements: (1) judgments about the past performance of states in handling their fiscal problems, (2) predictions about the future of world development based on modeling best- and worst-case scenarios about the prosperity of the industrialized countries, and (3) warnings and admonitions about policies to pursue in the future. Although the Bank's President warns that it is a staff product and that "the judgments in it do not necessarily reflect the view of our Board of Directors" (p. iv), a government seeking to make use of the Bank's resources will not want to overlook this volume. Neither will those lawyers who are concerned with private lending to developing countries, an operation nowadays apt to be closely intertwined with the activities of the major international public lending institutions.

DETLEV F. VAGTS

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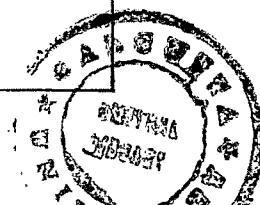
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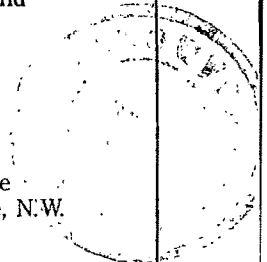
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*April 1986*

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Printed by Lancaster Press, Lancaster, Pa. 17604

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VOL. 80

April 1986

NO. 2

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# MEXICO'S GUIDELINES FOR FOREIGN INVESTMENT: THE SELECTIVE PROMOTION OF NECESSARY INDUSTRIES

By Sandra F. Maviglia\*

## INTRODUCTION

In February of 1984, the National Foreign Investment Commission of Mexico surprised the investment community by announcing that it would apply the Foreign Investment Law of 1973 (FIL)<sup>1</sup> with flexibility and would consider permitting foreign capital investment of up to 100 percent in a significant number of activities.<sup>2</sup> Actually, Mexico had been expected to increase its restriction of foreign investment in view of the Government's efforts to decrease its economic dependence upon other countries.

For more than a decade, Mexico had limited foreign equity participation to 49 percent. Since the FIL allows for exceptions, the 49 percent limitation on foreign ownership is in essence a general principle. The policy, however, had been to enforce strictly the 49 percent limitation with few exceptions, which prompted the erroneous belief that this policy was in fact the law.<sup>3</sup>

The initial reaction of foreign and Mexican investors to the recent shift in policy has been mixed. Some investors are concerned that businesses that incorporate with 100 percent foreign equity under the 1984 Guidelines<sup>4</sup> will later be subjected to governmental decrees limiting future activities.<sup>5</sup> These investors would favor fixed statutory rules in the form of a legislative amendment rather than flexible application of the current law.<sup>6</sup>

Other investors have assumed a more positive and rational attitude toward the change.<sup>7</sup> They take the position that, even if Mexico were to return to the 51-49 percent concept, businesses incorporated under the 1984 Guide-

\* Of the Michigan Bar. The author gratefully acknowledges the invaluable assistance of Licenciado Jorge Camil of the Mexican Bar and his partners in the preparation of this article. The author also gratefully acknowledges the perspectives shared by Mexico's investment community.

<sup>1</sup> Diario Oficial [D.O.], Mar. 9, 1973.

<sup>2</sup> NATIONAL FOREIGN INVESTMENT COMMISSION OF MEXICO, GUIDELINES FOR FOREIGN INVESTMENT AND OBJECTIVES FOR ITS PROMOTION (1984) [hereinafter cited as 1984 GUIDELINES]. See *infra* notes 92-126 and accompanying text. In a recent article, one foreign investment attorney predicted that "the general rule of 51/49 percent for Mexican joint ventures with foreign capital will not be changed," and that "in certain *exceptional* cases, a majority foreign capital will be permitted, generally on a *temporary* basis." Treviño, *Mexico: The Present Status of Legislation and Governmental Policies on Direct Foreign Investments*, 18 INT'L LAW. 297, 298 (1984) (emphasis added).

<sup>3</sup> See *infra* notes 64-91 and accompanying text.

<sup>4</sup> 1984 GUIDELINES, *supra* note 2, at 5.

<sup>5</sup> Wall St. J., June 12, 1984, at 39, cols. 1-4.

<sup>6</sup> *Id.*

<sup>7</sup> See generally *infra* notes 129-144 and accompanying text.

lines would retain their 100 percent foreign equity. This position finds support in the fact that businesses that had 100 percent foreign equity prior to enactment of the FIL in 1973 retained their 100 percent equity afterwards.<sup>8</sup> Indeed, United States investors currently hold approximately two-thirds of the \$11.5 billion in foreign investment in Mexico.<sup>9</sup>

A second question that appears to have been overshadowed by the release of the Guidelines is whether 100 percent foreign ownership is preferable to 49 percent foreign ownership with investment incentives. At present, Mexico offers a variety of attractive investment incentives to businesses that incorporate with at least 51 percent Mexican equity.<sup>10</sup> Consequently, there are distinct advantages to both majority and minority foreign equity. In the final analysis, the needs of the particular enterprise will dictate the decision.

Since the Guidelines were announced rather recently, and in view of the state of the world economy, it is too soon to determine their actual impact. It appears, however, that the pendulum of Mexico's attitude toward foreign investment has finally reached that central balance essential for rational economic development: the selective promotion of industries necessary for positive economic growth.

This article provides an overview of the Mexican legislative process and discusses the various restrictions on foreign investment. The current implementation of the 1973 FIL is also examined, including the ramifications of minority and majority foreign ownership. The substance of the 1984 Guidelines is presented, and the perceptions of bankers, corporations, the Foreign Investment Commission and the foreign investment legal community are explored. Finally, the article analyzes the advantages and disadvantages of regulating Mexico's foreign investments through legislative amendments rather than administrative policy, Mexico's changing position on foreign investment and the benefits of 100 percent foreign ownership under the 1984 Guidelines in view of the investment incentives offered to businesses with 51 percent Mexican equity.

### I. FOREIGN INVESTMENT LEGISLATION PRIOR TO 1973

To a large extent, Mexico's regulations on foreign investment are the result of administrative policy rather than the legislative process. In many cases, these policies have been adopted or changed with little or no publicity, and they frequently have been enforced under laws designed for unrelated purposes.<sup>11</sup> Consequently, the policies are often difficult to define and must be deduced by their application to specific cases. A prospective foreign investor must examine not only Mexico's foreign investment laws, but also the policies and practices of the executive branch of the federal Government

<sup>8</sup> Interviews with members of the Foreign Investment Commission and attorneys, *infra* note 127; and see *infra* notes 129-131 and accompanying text. There were, however, inducements to Mexicanize. See *infra* notes 53-55 and accompanying text.

<sup>9</sup> Wall St. J., *supra* note 5.

<sup>10</sup> See *infra* notes 56-57 and accompanying text.

<sup>11</sup> H. WRIGHT, *FOREIGN ENTERPRISE IN MEXICO*, at ix, 95-195 (1971).

to ascertain if, and to what extent, a business may be established in the country, the conditions under which the business will be received and whether the regulations to which the business will be subject are consistent with its interests.<sup>12</sup>

Throughout the past century, foreign investment in Mexico was affected by divergent trends. During the period spanned by the regime of Porfirio Díaz (1876–1911), it was believed that substantial investments in mining, utilities and basic industries would bring Mexico into a position commensurate with that of industrialized countries.<sup>13</sup> As a result, foreign investment was allowed to such an extent that it dominated the economy.<sup>14</sup> In fact, much of the nationalistic sentiment evoked today in Mexico over foreign investment derives from the prominence attained by foreign enterprises during the lengthy Díaz regime.<sup>15</sup>

In the absence of domestic investment sufficient to build a foundation for further development, extensive infusions of foreign capital were necessary, but they inspired a growing fear of increasing foreign influence. Moreover, Mexico's natural resources and labor were being exploited in the process. By the early 20th century, "the economic penetration of the country by foreign enterprises resulted in almost complete loss of control of the country's destiny to foreigners and foreign interests."<sup>16</sup>

Recovery of Mexico's "economic destiny" was one of the primary ideals to emerge during the country's Revolution of 1910–1920 and has remained an essential tenet of every subsequent administration.<sup>17</sup> The Mexican Constitution, promulgated in 1917, placed restraints on foreign economic activities and foreign ownership of land, which indicated the direction that limitations on the role of foreign capital would take in the future.<sup>18</sup>

### *The Legislative Process*

Although Mexico is a federal republic with both federal and state levels of legislative jurisdiction, the overwhelming majority of the statutes affecting its foreign investors are either federal or modeled after federal laws. Federal legislation is enacted by Congress; however, Congress rarely does more than give approval to statutory drafts submitted by the Executive. To become

<sup>12</sup> *Id.* at 4–6.

<sup>13</sup> *Id.* at 52. Foreign investment in Mexico, both direct and indirect, in 1911 has been estimated at U.S. \$1,700 million, of which between \$650 million and \$1,045 million was from the United States. *Id.* at 53. "Whatever the actual figures, it appears that by the end of the Díaz era foreigners probably owned over half of the total wealth of the country and that foreign control dominated every area of productive enterprise except agriculture and the handicraft industries." *Id.* (citations omitted).

<sup>14</sup> Foreign investment was particularly significant in railroad construction and mining, and, to a lesser degree, in public utilities, real estate, banking, manufacturing and commerce. *Id.* at 53. Furthermore, "[b]y the end of Díaz' rule . . . , foreigners probably owned one-fourth of the country's land area," *id.*; and "Mexicans were denied training and opportunity to advance to positions of responsibility," since foreign companies regarded the Mexican Indian as inferior and preferred more skilled workers. *Id.* at 59.

<sup>15</sup> *Id.* at 59.

<sup>16</sup> *Id.* at 61.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 63. See CONSTITUCIÓN DE LOS ESTADOS MEXICANOS [CONST.] art. 27 (1917).

effective, the legislation must be promulgated by the President and published in the *Diario Oficial de la Federación (Diario Oficial)*.<sup>19</sup>

In addition to indirect control over the legislative process, the President has authority to enact general rules in the form of regulations, which explain and supply detailed precepts for the application of specific laws;<sup>20</sup> to legislate directly in foreign trade;<sup>21</sup> and to exercise other legislative powers pursuant to congressional statutory delegation.<sup>22</sup> Indeed, a significant amount of existing legislation was enacted under the President's "extraordinary legislative power."<sup>23</sup>

In 1938, however, the Constitution was amended to provide that such "authority to legislate could be granted only in connection with a suspension of individual guarantees in times of grave national emergency under article 29."<sup>24</sup> Constitutional guarantees have been suspended only once since that time, in 1944, and, although most of the presidential decrees issued during that period were later repealed,<sup>25</sup> the decree establishing the basis for quantitative restrictions<sup>26</sup> on direct foreign investment remained intact.

<sup>19</sup> H. WRIGHT, *supra* note 11, at 16. "Promulgation is the act by which the President gives authenticity to and orders the entry into effect of a law." *Id.* The *Diario Oficial* is the official federal daily journal and the only authorized repository of federal legislation. *Id.*

<sup>20</sup> CONST. art 89, §1. Most statutes are supplemented by regulations. Regulatory provisions may not contradict those of the correlative statute and therefore are subordinate. Promulgation and publication are made in the same manner as statutes, and the enactment of a regulation takes the form of a decree. H. WRIGHT, *supra* note 11, at 16-17.

<sup>21</sup> Congress has delegated to the President the authority to establish by executive decree tariffs and restrictions on imports and exports. H. WRIGHT, *supra* note 11, at 17-18.

<sup>22</sup> Other forms of executive enactment include the circular and the official communication, which are instructions issued within ministries concerning interpretation and application of laws. Official communications "are also sometimes used to notify private persons of administrative actions or decisions. While they are customarily of an internal nature only, they may be given the binding character of a regulation." *Id.* at 17.

<sup>23</sup> *Id.* According to Wright, such congressional delegations were "so frequent throughout the latter part of the nineteenth century and until the 1930's that there was often hardly even a pretense of an independent legislative branch." *Id.* See also F. RAMÍREZ, *DERECHO CONSTITUCIONAL MEXICANO* (6th rev. ed. 1963); Baggett, *The Delegation of Legislative Power to the Executive under the Constitution of Mexico*, 8 S. CAL. L. REV. 114 (1935). Although Mexico's political structure is beyond the scope of this article, a few basic principles are essential to an understanding of the legislative process. Mexico has only one primary political party, commonly referred to as the PRI (Partido Revolucionario Institucional). The PRI (or its antecedents) has elected every President, the overwhelming majority of governors and most of the positions in the Congress, as well as state and local governments. DEAN RUSK CENTER FOR THE NAT'L GOVERNOR'S ASS'N COMM. ON INT'L TRADE AND FOREIGN RELATIONS, *COMPARATIVE FACTS ON CANADA, MEXICO AND THE UNITED STATES* (1980). The PRI represents three organized interest groups, the labor, agrarian and public sectors, and, consequently, the President "must maintain a certain balance. . . . In spite of his theoretical power, the President's decisions must be made in an atmosphere characterized more by finesse comparable to that needed in a tightrope act than by impetuosity. . . ." Margadant, *Mexico and the United States: The Need for Frankness*, 18 TEX. INT'L L.J. 455, 459-60 (1983).

<sup>24</sup> H. WRIGHT, *supra* note 11, at 17. See CONST. art. 49..

<sup>25</sup> H. WRIGHT, *supra* note 11, at 17. Constitutional guarantees were suspended from June to September 1942 following Mexico's entry into World War II. Most of the decrees issued by the President were "in effect only during the period of the emergency and were repealed by congressional decree terminating the emergency." *Id.*

<sup>26</sup> "Quantitative restrictions" are those limitations placed upon the percentage of equity that a foreign investor may have in a Mexican enterprise.

*Restrictions on Foreign Investment*

The Emergency Decree of 1944<sup>27</sup> granted extensive discretionary control over foreign capital to the Ministry of Foreign Relations<sup>28</sup> and was intended to avert disruption of the economy by temporary investments of flight capital.<sup>29</sup> The decree introduced restraints on the "creation, modification, liquidation and transfer of stock"<sup>30</sup> of Mexican companies that might have foreign shareholders and were organized subsequent to its enactment. While it originally affected few and relatively insignificant activities,<sup>31</sup> the Emergency Decree was nonetheless the precursor of present legal restraints on foreign investment in Mexico.<sup>32</sup>

Two years later, the Interministerial Committee was created to coordinate national and foreign investment.<sup>33</sup> Composed of representatives of the President and several ministries,<sup>34</sup> it was established to make "a systematic and continuing study" of foreign investment in Mexico so that "a proper balance" between foreign and domestic capital could be maintained.<sup>35</sup> The committee, however, "largely ratified the practices already adopted by the Ministry of

<sup>27</sup> D.O., July 7, 1944 [hereinafter cited as the Emergency Decree].

<sup>28</sup> A. HOAGLAND, *COMPANY FORMATION IN MEXICO*, at B-2 (1972). See also H. WRIGHT, *supra* note 11, at 101-03.

<sup>29</sup> "Flight capital" refers to capital from countries "in which investments were considered unsafe." H. WRIGHT, *supra* note 11, at 102. Because Mexico's booming wartime economy was attracting a growing influx of foreign capital, it was feared that existing Mexican investments would be displaced, that certain sectors of the economy would be monopolized and "that a large-scale inflow of capital having no permanent ties to the economic and social interests of the country and its subsequent withdrawal to the country of origin after the war would result in severe damage to the Mexican economy." *Id.* The term is also commonly used to refer to capital withdrawn from a country in anticipation or fear of governmental monetary restrictions or of loss in value for any reason.

<sup>30</sup> A. HOAGLAND, *supra* note 28, at B-2. Also, existing limits on land acquisitions by foreigners were strengthened. *Id.*

<sup>31</sup> Gordon, *The Joint Venture as an Institution for Mexican Development: A Legislative History*, 1978 ARIZ. ST. L.J. 173, 183. Under the Emergency Decree, permission from the Ministry of Foreign Relations was required for the acquisition of total or controlling ownership of agricultural undertakings, cattle raising, forestry, mining concessions, real estate, and industrial and commercial enterprises. *Id.*

<sup>32</sup> A. HOAGLAND, *supra* note 28, at B-2. Although little was done to regulate foreign investment for almost a year after the Emergency Decree was issued, in 1945 the Ministry of Foreign Relations issued a list of activities in which majority Mexican equity was required. Activities on this list included domestic air and highway transportation, fishing, advertising, publishing, radio broadcasting, the film industry and the production of carbonated beverages. H. WRIGHT, *supra* note 11, at 104. In 1947 the Ministry expanded the restriction on carbonated beverages to include distribution and sale in addition to production, *id.* at 105; and in 1960 the radio broadcasting industry was completely closed to foreign investment. A. HOAGLAND, *supra*, at B-2.

<sup>33</sup> D.O., June 23, 1947 [hereinafter referred to as the committee].

<sup>34</sup> The Interministerial Committee included representatives from the Ministries of Internal Affairs, Foreign Relations, Economy (now Commerce and Industrial Promotion) and Agriculture when created in 1947. A representative of the Ministry of Communications and Public Works was added by the Decree of Dec. 1, 1949, D.O., Apr. 3, 1950. H. WRIGHT, *supra* note 11, at 104.

<sup>35</sup> H. WRIGHT, *supra* note 11, at 104.

Foreign Relations under its discretionary powers."<sup>36</sup> Since 1953, the committee has functioned haphazardly, and its significance has depended upon the conduct of the incumbent administration.

Nevertheless, the committee's inaction did not deter enforcement of the Emergency Decree, which the Ministry of Foreign Relations in fact expanded beyond its literal provisions. Even though the Emergency Decree applied only to specifically delineated activities, the Ministry instructed notaries and public registry officials that licenses were required for the incorporation or amendment of the articles of any company, regardless of the purpose or nature of the business.<sup>37</sup>

At the same time, beginning in the early part of World War II, Mexico's attitude toward foreign capital shifted in an effort to improve the economy. Between 1940 and 1965, direct foreign investment almost quadrupled, and by 1969, it exceeded two billion dollars.<sup>38</sup> This increase, however, was accompanied by pressure from Mexican industrialists to limit the inflow of foreign capital.<sup>39</sup> Extensive foreign investment was noted to result in decapitalization and to increase the country's balance-of-payments problems.<sup>40</sup> Government economists also were concerned and recommended that "the

<sup>36</sup> *Id.* The committee did extend the 51% Mexican equity concept to the bottling industry in 1948 and to the rubber industry in 1953. A. HOAGLAND, *supra* note 28, at B-2. In other directives issued by the committee, the following stipulations and decisions were made.

(1) Certain classes of non-Mexican citizens were to be considered Mexican for investment purposes. Gordon, *supra* note 31, at 185. See generally H. WRIGHT, *supra* note 11, at 196-217, for a complete discussion of the entry and status of aliens and foreign legal entities.

(2) The Ministry of Foreign Relations had to be notified prior to the transfer of stock in companies on the restricted list. Also, the Ministry's use of discretion under the Emergency Decree was affirmed "in cases where such a transfer of stock, if restricted to Mexicans, could cause a loss to the Mexican shareholders." Gordon, *supra*, at 185-86.

(3) The committee "was to be consulted before the Ministry of Foreign Relations exercised its discretionary powers under Article 3(III) of the 1944 Emergency Decree." *Id.* at 186.

(4) Applications before the Ministry relating to the petroleum industry "also were to be submitted to the Ministry of Economy [now Commerce and Industrial Promotion] and to Petroleos Mexicanos for comments and recommendations regarding necessary limitations." *Id.*

(5) Conditions of investing were issued for persons seeking to immigrate to Mexico. *Id.*

(6) The right of companies in existence prior to the Emergency Decree to acquire real property necessary for their business was clarified. *Id.*

(7) Companies engaged in international shipping were allowed to have majority foreign ownership "if there was not sufficient available Mexican capital." *Id.* The committee reaffirmed, however, that "domestic maritime shipping was reserved for Mexican control." *Id.*

(8) Mexican-owned majority shares were required to have full voting rights. *Id.* Directives issued by the committee may be found in O. RAMOS GARZA, *MÉXICO ANTE LA INVERSIÓN EXTRANJERA* (1971); and CENTRO DE ESTUDIOS ECONÓMICOS DEL SECTOR PRIVADO, *LA LEGISLACIÓN MEXICANA EN MATERIA DE INVERSIONES EXTRANJERAS* (1978).

<sup>37</sup> H. WRIGHT, *supra* note 11, at 104.

<sup>38</sup> *Id.* at 92-93.

<sup>39</sup> The Mexican industrialists were organized, with the Cámara Nacional de la Industria de Transformación (CANACINTRA or CNIT) as the principal outlet for their views. *Id.* at 78.

<sup>40</sup> CANACINTRA argued that the effect of extensive foreign investment "is to 'decapitalize' the country and thus to add to the balance of payments problems because more capital is taken out of the country annually by foreign firms in the form of profits than is brought in as new investment." *Id.*

pattern of investment in assembly and processing operations, characteristic of the 1940's . . . be broken and greater use of domestically produced intermediate materials encouraged to stimulate import substitution."<sup>41</sup>

Efforts were increasingly made to displace foreign investment. Joint ventures of Mexican and foreign capital were promoted, as were industrial integration programs, and foreign participation was excluded from certain industries and severely limited in others.<sup>42</sup> In 1966 the Ministry adopted another significant policy: to deny licenses for the acquisition of majority interests in existing Mexican companies.<sup>43</sup>

The *mélange* of restricted industries suggests that there was no overall planning or general policy concerning foreign participation in the Mexican economy. Some of the restrictions related to national security and the public welfare, while others seem to have been imposed in response to pressure from ad hoc private groups fearful about foreign competition. Furthermore, although special laws were enacted that expressly limited foreign investment in certain industries,<sup>44</sup> other industries were added to the restricted list "solely on the basis of policy decisions by the Ministry of Foreign Relations, acting either on its own initiative or, more likely, on the initiative of, or at least with the concurrence of, other governmental agencies."<sup>45</sup>

<sup>41</sup> *Id.* at 78-79.

<sup>42</sup> Between 1959 and 1965, the timber industry was reserved to Mexicans; firms producing raw materials or basic products, the telephone system and the emerging petrochemical industry were added to the 51% Mexican equity list; and foreign capital in the mining industry was severely limited. With the Mexicanization of the mining industry, Mexico had brought the four traditional areas of foreign dominance under domestic control: railroads, mining, petroleum and public utilities. The railroads were nationalized in 1937, the petroleum industry in 1938, the utilities in 1960, and mining in 1961. Although the Government did not actually nationalize the mining industry, it made Mexicanization very attractive by halting exporting permits, increasing reserve requirements and offering export, price and tax inducements. *Id.* at 80-90. Additionally, foreign governments and agencies and "financial entities from abroad, or groups of foreign persons or legal entities" were excluded from banking, insurance, bonding and investment businesses because domestic investment in these activities was considered sufficient. *Id.* at 91. In 1982 the Government nationalized the banks. D.O., Sept. 1 and 6, 1982. For an excellent analysis of changes in Mexico's banking and financial structure over the past 12 years, see Camil, *The Nationalized Banking System and Foreign Debt*, 18 INT'L LAW. 323 (1984). Foreign ownership was also limited in the steel, cement, glass, fertilizer, cellulose and aluminum industries pursuant to a decree of 1970. D.O., July 2, 1970. The restriction applied primarily to the establishment of new companies in those industries, and companies existing and in operation as of 1970 were not affected by it unless they decided to acquire or install new facilities. H. WRIGHT, *supra* note 11, at 91, 149.

<sup>43</sup> Gordon, *supra* note 31, at 197.

<sup>44</sup> Industries restricted by law between 1959 and 1963 include mining, television and petrochemicals. H. WRIGHT, *supra* note 11, at 105.

<sup>45</sup> *Id.* at 105-06. These activities include the preservation and packaging of food products, which "resulted from the rather sudden rush of several United States companies to enter Mexico either by establishing new operations or by acquiring existing ones and the government's concern over the rapid occupation of the field by foreign companies," and the manufacture and distribution of fertilizers, insecticides and basic chemical products, which "may have been the outgrowth of the 1959 statutory restriction on foreign investment in the petrochemical industry." *Id.* at 106.



By 1970, the only legal restrictions on the amount of foreign participation in industrial activities were those resulting from the application of the Emergency Decree of 1944 and the exclusion of private participation, both domestic and foreign, in nationalized industries.<sup>46</sup> The Government used other techniques, however, to divest foreigners of control and ownership, including tax incentives and the selective application of import controls.<sup>47</sup> As one author has noted, the administration "seemed to prefer the flexibility in shaping its policies to individual investment projects that was allowed by the absence of a general law on foreign investments,"<sup>48</sup> and it adopted "specific statutory restraints in selected industries as it felt the need or desirability [to arise]."<sup>49</sup>

The resultant overall attitude toward foreign investment was "one of cautious acceptance,"<sup>50</sup> although many perceived it to be excessively protective and nationalistic. Foreign investment was encouraged as a complement to domestic investment, and the Ministry of Commerce and Industrial Promotion increasingly insisted on Mexicanization<sup>51</sup> and industrial integration.<sup>52</sup>

Businesses dependent upon imports of raw or intermediate products or materials, or of machinery or equipment learned that procurement of the necessary import licenses might depend on whether they had become Mexicanized.<sup>53</sup> The Ministry of Commerce and Industrial Promotion supervised not only the issuance of such licenses, but also industrial integration programs. In return for a guarantee by the Ministry that the necessary licenses would be granted, that imports of competing products would be excluded or that Mexican competitors would need to meet the same conditions, new and existing companies agreed to increase the Mexican content of their products, limit prices and payments abroad,<sup>54</sup> observe quality control standards and divert 51 percent of their capital stock to Mexicans over a specified period of time. Furthermore, foreign investors learned that the availability of tax concessions depended upon Mexicanization. As a result, an informal process of clearing investment projects with the Ministry of Commerce and Industrial Promotion developed, as prospective foreign investors sounded out the administration for assurances that their projects would be favorably received.<sup>55</sup>

The position of the foreign investor also changed. Tax and other concessions were offered to concerns with majority Mexican ownership under the

<sup>46</sup> See generally *id.* at 50-195.

<sup>47</sup> *Id.* at 83-84.

<sup>48</sup> *Id.* at 83.

<sup>49</sup> *Id.* at 95.

<sup>50</sup> *Id.* at 86.

<sup>51</sup> "Mexicanization" refers to the process by which the percentage of Mexican participation in an industry is increased, usually to at least 51%. *Id.* at 87. See also *infra* note 70 for those industries where the percentage of Mexican participation had to be increased to more than 51%.

<sup>52</sup> See *supra* notes 41-42 and accompanying text.

<sup>53</sup> A. HOAGLAND, *supra* note 28, at B-3.

<sup>54</sup> *Id.* These payments typically included royalties, interest, patents, trademarks, technical assistance and technology. *Id.*

<sup>55</sup> H. WRIGHT, *supra* note 11, at 84.

1972 Law for the Promotion of New and Necessary Industries,<sup>56</sup> to manufacturing businesses in the border zones<sup>57</sup> and areas outside Mexico City, and to enterprises exporting Mexican manufactured products; but the administration was no longer receptive to the establishment of firms for the final processing or mere assembly of imported parts or intermediate products. Also, enterprises that were heavily dependent on imports were subjected to strong pressure to develop domestic production.<sup>58</sup> The informal process of clearing proposed new investments and important expansions of existing facilities was "virtually institutionalized,"<sup>59</sup> and although still not required by law, the Ministry usually insisted that the projects be underwritten with a majority of Mexican capital.<sup>60</sup>

Between 1972 and 1976, Mexico extended the controls over foreign investment.<sup>61</sup> Of utmost importance was the Law for the Promotion of Mexican Investment and for the Regulation of Foreign Investment (the Foreign Investment Law or FIL), enacted in 1973.<sup>62</sup> Its purpose was to codify existing

<sup>56</sup> D.O., July 20, 1972. According to Gordon, *supra* note 31, "[t]he law granted complete or partial tax exemption for qualifying industries, extended it to ten years for basic industries, seven years for semi-basic industries and five years for secondary industries. Only those industries which were at least 51 percent Mexican owned could qualify." *Id.* at 198.

In identifying the "basic industries" included under this law, Gordon explains:

Basic industries were those producing raw materials, machines, equipment or vehicles essential for one or more economic activities of fundamental importance to the industrial or agricultural development of the country. They also had to supply at least 20 percent of the Mexican market. Semi-basic industries included those which produced vitally necessary consumer goods, tools, scientific equipment or secondary industrial equipment, and which satisfied at least 15 percent of the market. All other goods-producing industries were classified as secondary.

*Id.* n.118.

<sup>57</sup> Manufacturing businesses in the border zone are commonly known as "in-bond" companies or "maquiladoras," and are assembly plants that are not subject to the general regulations on foreign investment. As part of Mexico's Border Industrialization Program, they were "[i]ntended to absorb the border unemployment left by the termination of the 'bracero' program." Grunwald, *Restructuring Industry Offshore: The U.S.-Mexico Connection*, BROOKINGS REV., No. 3, 1983, at 24, 24-25. Imports of equipment, machinery and components for processing or assembly within a 20-kilometer strip along the border were allowed duty free so long as all of the products were reexported. The scope of the assembly operations has been expanded, and although most of the plants are located along the border, others are located throughout the country. Direct foreign investment may be, and usually is, 100%, and substantial incentives are offered to investors. *Id.*

<sup>58</sup> H. WRIGHT, *supra* note 11, at 84-85.

<sup>59</sup> *Id.* at 87.

<sup>60</sup> *Id.*

<sup>61</sup> The Law on Control and Registration of the Transfer of Technology and the Use and Exploitation of Patents and Trademarks [hereinafter cited as the Law on the Transfer of Technology] was originally enacted in 1972, D.O., Dec. 30, 1972, and created the National Registry for the Transfer of Technology. It was amended in 1982, D.O., Jan. 11, 1982. In 1976, the Industrial Property Law was revised and is now entitled the Law of Inventions and Trademarks. The revision imposes further limitations on foreign patent and trademark owners. D.O., Feb. 10, 1976. The 1973 Foreign Investment Law, *supra* note 1, is of primary importance to this article.

<sup>62</sup> See *supra* note 1 and *infra* notes 63-87 and accompanying text.

laws, regulations and policies, and it established the National Foreign Investment Commission (FIC) to exercise significant discretionary powers created by law, and the National Registry of Foreign Investment (FIR).<sup>63</sup>

## II. THE FOREIGN INVESTMENT LAW AND THE FOREIGN INVESTMENT COMMISSION

Since 1973, the FIL has been the principal source of foreign investment restrictions.<sup>64</sup> It applies to capital investments in Mexican businesses, to investments in the acquisition of Mexican real or personal property, and to other specified transactions, including the pledging of Mexican corporate shares to foreigners and foreign participation in a real property trust. It is restrictive, however, only with regard to direct investment; it does not explicitly regulate indirect investment such as loans.<sup>65</sup>

Actually, the FIL set forth only two major changes in the restriction of foreign investment. It limited foreign participation in the management of a corporation to the proportion of foreign capitalization and established the 49-51 percent concept as a general rule. This was the first time legislation required majority Mexican participation in a broad spectrum of activities and not in just a single activity.<sup>66</sup> Although the FIL does not explicitly define either foreign investment or foreign investors, it does provide a list of activities and individuals that will be considered as such.<sup>67</sup> It stipulates those

<sup>63</sup> Today, both the Foreign Investment and Transfer of Technology Registries are contained within the General Bureau of Foreign Investment and Transfer of Technology of the Ministry of Commerce and Industrial Promotion. A. HOAGLAND, *supra* note 28, at B-4.

<sup>64</sup> Other major sources of Mexican foreign investment legislation include the Constitution, *supra* note 18; the Regulations of the National Registry of Foreign Investments, D.O., Dec. 11, 1973; *see also* D.O., Dec. 28, 1979; the General Resolutions of the National Foreign Investment Commission (FIC), *infra* at text accompanying notes 119-126; the Law on the Transfer of Technology, *supra* note 61; and the Regulations of the Law on the Transfer of Technology, D.O., Nov. 25, 1982.

<sup>65</sup> A. HOAGLAND, *supra* note 28, at B-11.

<sup>66</sup> *See, e.g.*, the 1961 Mining Law, D.O., Feb. 6, 1961, *amended by* D.O., Jan. 4, 1966.

<sup>67</sup> The list is included in Article 2 of the FIL, *supra* note 1, with further explanation in Article 6:

Article 2. For the purposes of the provisions hereof, foreign investment shall be that made by:

- I. Foreign corporations,
- II. Foreign individuals,
- III. Non-incorporated foreign enterprises, and
- IV. Mexican companies with a majority of foreign capital or those in which foreigners may have, under any title, the power to control the administration of the corporation.

Article 6. For the purposes of this law investments made by foreigners living in the country as permanent residents shall be considered to be Mexican investment, except when the economic activities of said foreigners are subject to centers of economic decisions abroad. This provision shall not be applied to those geographical areas or to those activities reserved exclusively to Mexican individuals or corporations excluding foreign participation, or subject to specific regulations.

The status and activities of immigrants shall be regulated by the provisions of the General Law of Population.

economic activities exclusively reserved to the Government,<sup>68</sup> those reserved to Mexican individuals or corporations without foreign participation<sup>69</sup> and those in which foreign participation is specifically limited to less than 49 percent.<sup>70</sup> It also contains a general provision limiting foreign participation in new businesses whose activities are otherwise not regulated to a maximum of 49 percent.<sup>71</sup> Furthermore, the FIL requires governmental authorization for investments acquiring more than 25 percent of the equity or more than 49 percent of the fixed assets of an existing Mexican company,<sup>72</sup> and for any transaction resulting in the transfer of management to a foreign investor.<sup>73</sup>

Unless a foreign investor is interested in establishing a business with more than 49 percent foreign equity, the business may simply be registered with the FIR.<sup>74</sup> However, the final decision on whether a foreign investor may hold a majority of foreign capital and control rests with the FIC.

<sup>68</sup> Pursuant to Article 4 of the FIL, *id.*, oil and gas, basic petrochemicals, exploitation of radioactive minerals and the production of nuclear energy, mining in the particular cases referred to by the applicable laws, electric power, railroads, telegraphic and radiotelegraphic communications, and other activities and industries set forth by specific statutes are exclusively reserved to the state.

<sup>69</sup> Also pursuant to Article 4 of the FIL, *id.*, radio and television, urban and inter-urban transportation and transportation on federal highways, air and maritime transportation, forestry, distribution of gas, and other activities set forth by specific statutes or regulations enacted by the federal Executive are exclusively reserved to Mexican individuals or corporations.

<sup>70</sup> Pursuant to Article 5, *id.*, foreign investment will be allowed in the following activities or companies in the proportions specified:

- a) Exploitation of minerals. Concessions for exploitation thereof may not be granted or transferred to foreign individuals or corporations. In companies engaged in those activities, foreign investment may participate up to a maximum of 49% in the event of exploitation of minerals subject to ordinary concession, and up to a maximum of 34% in the event of special concessions for the exploitation of natural minerals reserves;
- b) By-products of petrochemicals: 40%;
- c) Manufacturing of automobile components: 40%; and,
- d) Those activities set forth by specific statutes or by regulations published by the Federal Executive.

<sup>71</sup> Article 5 further provides:

In the event where the applicable legal provisions, or regulations, do not require a definite percentage, foreign investment may only participate in a proportion not to exceed 49% of the capital stock of a company, provided however, that the foreign investors do not have, under any title, the power to determine the administration of the company.

*Id.* But see *infra* note 136 and accompanying text.

<sup>72</sup> This is true whether the maximum percentages are acquired "in one or more simultaneous or successive transactions. . . . For the purposes of the [FIL], the leasing of assets essential to the carrying on of an enterprise's operations constitutes an acquisition." Treviño, *supra* note 2, at 303.

<sup>73</sup> *Id.*

<sup>74</sup> Under the FIL, all newly created business concerns, both domestic and foreign, must register with the National Registry of Foreign Investment (FIR). Additionally, all foreign concerns existing when the FIL was enacted were required to register. *Id.* See also *infra* notes 121-123 and accompanying text; and NATIONAL FOREIGN INVESTMENT COMMISSION OF MEXICO, FOREIGN INVESTMENTS, JURIDICAL FRAMEWORK AND ITS APPLICATION 23 (1984) [hereinafter cited as FOREIGN INVESTMENTS, JURIDICAL FRAMEWORK]. In late 1984, the FIC published this

Since the 1973 law vested the FIC with broad discretionary powers, the commission could increase the "maximum" 49 percent foreign equity whenever it deemed the project beneficial to the Mexican economy. The burden, though, now fell on the foreign investor to show that majority foreign equity and control would "stimulate a balanced and equitable development" and "consolidate the economic independence of the country."<sup>75</sup>

The FIC consists of representatives of the President and seven ministries,<sup>76</sup> and meets on a monthly basis. Pursuant to its statutory powers, it may: (1) increase or reduce<sup>77</sup> the percentage of foreign participation in geographical areas or economic activities when there are no required definite percentages and establish the terms and conditions under which the investment will be received;<sup>78</sup> (2) resolve on specific percentages and conditions for those projects which "may justify special treatment";<sup>79</sup> (3) resolve on projected foreign investment in companies established or to be established in Mexico; (4) resolve on the participation of existing foreign investors in new areas of economic activities or in new product lines; and (5) establish "requirements and criteria" for the application of foreign investment laws and regulations.<sup>80</sup> Pursuant to the FIL, the FIC issues General Resolutions setting forth standards and requirements for applying the law, although there are no "regulations" per se.<sup>81</sup>

Applications submitted to the FIC for approval of majority foreign equity are first analyzed by a technical committee and then submitted to the FIC for formal acceptance. Invariably, applications undergo a process of negotiation, ranging from 4 to 16 months in duration.<sup>82</sup>

booklet with the intent of guiding both domestic and foreign investors. The booklet purports to be a "systematic compilation of those elements that form the legal structure applicable to foreign investment in Mexico." *Id.* at 3. While it is a helpful resource, it does not deal with the important issue of taxation.

<sup>75</sup> See *supra* note 1, Arts. 1 and 5; see also Gordon, *supra* note 31, at 200.

<sup>76</sup> As of Jan. 1, 1982, the FIC included representatives from the Ministries of the Interior, Foreign Relations, Public Credit and Finance, Mines and Energetics, Commerce and Industrial Promotion, Labor, and Programming and Budgeting. Treviño, *supra* note 2, at 304 n.25.

<sup>77</sup> See *supra* note 1, Arts. 5 and 12(1). See also *infra* note 136.

<sup>78</sup> See *supra* note 1, Art. 12(1).

<sup>79</sup> *Id.*, Art. 12(2).

<sup>80</sup> Additionally, the FIC is empowered to:

(1) "Be the consulting authority in matters of foreign investment for agencies of the Federal Executive, decentralized agencies, companies with State participation, trustees of trusts settled by the federal government or by the government of the States, as well as for the National Securities Commission." *Id.*, Art. 12(5).

(2) "Coordinate the activities of agencies from the Federal Executive, decentralized agencies and companies with State participation so that they may adequately comply with its attributions in matters of foreign investment." *Id.*, Art. 12(7).

(3) "Submit to the consideration of the Federal Executive legislative programs, regulations and administrative measures in matters of foreign investment." *Id.*, Art. 12(8).

(4) Exercise other powers granted to it under the FIL. *Id.*, Art. 12(9).

<sup>81</sup> Treviño, *supra* note 2, at 305.

<sup>82</sup> The negotiation process will result in the imposition of conditions relating to the criteria outlined *infra* in the text accompanying notes 85-86.

Investment with majority foreign equity has had several disadvantages: the length of time required to obtain approval for either the formation or expansion of a company, and the restricted sources of tax and other investment incentives.<sup>83</sup> In contrast, an investment of 49 percent or less foreign equity can be organized immediately, may be expanded into different areas or used for new product lines, qualifies automatically for tax and other incentives, and usually will provide easier access to administrative agencies and the various licenses required for imports. Furthermore, Mexican laws protect minority shareholders, whether Mexican or foreign, against decisions by a majority group of shareholders, and additional protection may be secured by provisions inserted into the bylaws or articles of incorporation.

Since the enactment of the 1973 FIL, exceptions to the 49-51 percent concept have been granted rarely and only under special circumstances. Foreign equity in excess of 49 percent has tended to be approved in such sectors as tourism, priority industries, advanced technology, capitalization and investments preserving employment, and for priority activities of Mexican corporations with severe economic problems.<sup>84</sup> Furthermore, the overwhelming majority of these exceptions have been contingent upon agreement eventually to Mexicanize.

The FIC bases its decisions on the criteria set forth in the National Industrial Development Plan (NIDP)<sup>85</sup> and the FIL. The foreign investment allowed should always be complementary to the Mexican economy; there should not be substitution of fields covered; the company should be ready to export; it should commit itself to a precise plan to train Mexican personnel; a high percentage of the financing should come from abroad; there should be diversification of the sources of investment; the company should have a significant positive effect on local employment; the project should preserve the cultural and social values of Mexico; it should be located in an underdeveloped geographical area; and it should contribute to the technological development of the country.<sup>86</sup>

Two of the most significant criteria considered by the FIC in determining exceptions under the FIL are whether the proposed activity is an industry or is in a geographical area encouraged under the NIDP. Although each presidential administration adopts its own NIDP, the underlying premise remains constant. Accordingly, the 1983-1988 NIDP incorporates criteria set forth in the FIL. Moreover, the 1983 NIDP contains detailed political and economic policies governing "the Mexican State, the diagnosis of the national problems, the purposes and strategies of solutions in a national and international context, and the bases for implementation of those strategies."<sup>87</sup>

<sup>83</sup> See *supra* note 56 and accompanying text; see also *infra* note 125 and accompanying text.

<sup>84</sup> Treviño, *supra* note 2, at 307. As noted in the text *infra* at note 127, interviews were conducted throughout the period from the summer of 1984 through the summer of 1985 with various members of Mexico's foreign investment legal community; some of these exceptions had been granted to their clients.

<sup>85</sup> Federal Chief Executive, National Industrial Development Plan, 1983-88 (1983).

<sup>86</sup> *Id.* See also *supra* note 1, Art. 13.

<sup>87</sup> Treviño, *supra* note 2, at 299 (footnotes omitted). Policy statements concerning direct

Each NIDP, therefore, provides indicators of the attitude and direction to be taken by the incumbent administration toward foreign investment.

In February 1983, the Constitution was amended,<sup>88</sup> enabling "the federal government to adopt measures of great scope in economic matters, and reorienting the principles governing the actions of the state and private individuals."<sup>89</sup> The amendments embody principles consistent with the present administration's philosophy of *la Rectoría del Estado* (the state as sovereign and the sole conductor of the economy). The amendments identify activities reserved exclusively to the Government, but they also provide for the development of the private sector.

In view of the increasing restrictions on the amount of allowable foreign equity in various activities, the formidable effort required to obtain an exception to the 49-51 percent "rule" and the few exceptions granted, the FIC's announcement in February 1984 that it would consider up to 100 percent foreign capital investment in a significant number of activities ran completely counter to the expectations of the investment community.

Mexico's present policy on foreign investment is in the process of evolution and finds support in the FIL, the NIDP, resolutions of the FIC, and declarations by the Executive Secretary of the FIC and the Secretary of Commerce and Industrial Promotion.<sup>90</sup> It focuses primarily on the selective promotion of new or necessary industries. No longer amenable to the acceptance of foreign investment in an indiscriminate manner,<sup>91</sup> it does, however, encourage activities that will further the economic development of the country.

### III. THE 1984 GUIDELINES FOR FOREIGN INVESTMENT AND OBJECTIVES FOR ITS PROMOTION

The primary objective of the 1984 Guidelines for Foreign Investment is the active, systematic and selective promotion of foreign investment in specific activities considered the most important for "a fair and balanced growth of the Mexican economy."<sup>92</sup> That promotion is to focus on those areas which

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foreign investment may also be made by the Secretary of Commerce and Industrial Promotion. Treviño summarizes recent declarations by the Secretary:

Foreign investment will have an important place in the future of the country; in special cases, there may be a majority of foreign capital in Mexican companies, provided it assists in national development and is subject to Mexican interests; direct investment by any country should be directed and oriented in accordance with the priorities of the development strategy of Mexico, and should support the efforts of Mexican enterprises to modernize and consolidate the productive system of the country; and on the basis of the criteria of the respective laws, the [FIC] decides whether the foreign investment is acceptable for the country, and the formalities and requirements to which it should submit are determined.

*Id.* at 302 (footnotes omitted).

<sup>88</sup> Amendments to Articles 16, 24, 26, 27-XIX and -XX, 28, 73 and 29D, E and F were approved on Feb. 2, 1983. D.O., Feb. 3, 1983. See also Treviño, *supra* note 2, at 298-99.

<sup>89</sup> Treviño, *supra* note 2, at 298-99.

<sup>90</sup> *Id.* at 300.

<sup>91</sup> *Id.* at 301.

<sup>92</sup> D.O., Aug. 30, 1984 (General Resolutions of the FIC) (five resolutions published pursuant

will generate a positive foreign exchange balance, produce competitive exports and import substitution, contribute to national scientific and technological development, advance Mexico's further integration into the international community, involve large investments, and create employment and geographical decentralization of industry.<sup>93</sup>

In analyzing the basis of foreign investment policy, the FIC acknowledges that, "[a]lthough an adequate Law exists for direct foreign investments, a systematic policy has not always been followed for an effective utilization of its potential for the country's development."<sup>94</sup> The FIC has found that, in reality, "the effective use of investments to promote national technological development, to efficiently replace imports or generate exports for a positive trade surplus"<sup>95</sup> has been hindered by multinational corporations that "frequently tend to seek benefits through equipment and technologies already obsolete in their own countries, protectively, and obtain excessive gains at the expense of national consumers."<sup>96</sup>

Similarly, the FIC concedes that, while past practices have quantitatively limited foreign investment, such practices have not induced a "favorable direction."<sup>97</sup> Instead, foreign investment policy "has been limited to a simple check of investment propositions, set forth in accordance with international production strategies, or marketing of foreign companies' products, not always adequate to local, or national priorities or those of certain sectors."<sup>98</sup> The FIC also recognizes that negotiations regarding foreign investments have been "limited to imposing local integration requirements or filling export quotas," with "[t]he latter in many cases hav[ing] been difficult or impossible to follow."<sup>99</sup>

The Guidelines represent the FIC's attempt to correct these deficiencies by adjusting Mexico's policies on foreign investment and its regulation. While foreign investment will remain a "complement" to domestic investment, the "policy will cease to be merely defensive and [will] turn active and systematic, promoting the formation of foreign investment alternatives, according to needs derived from national development priorities."<sup>100</sup>

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to the Guidelines; see notes 119-126 *infra* and accompanying text). See also FOREIGN INVESTMENTS, JURIDICAL FRAMEWORK, *supra* note 74, at 24:

An active, systematic and selective policy is meant to be implemented within this framework, it is active to promote projects that, besides fitting in the inforced [*sic*] laws on that matter, fit in the fields of action described in the general development strategy; it is systematic and selective because its corresponding promotion shall be centered on those areas in which technology is the key factor to achieve levels of international competition; promotion of exports whose channels make them useful and in activities needing large investments and import substitution when creating priority productive chains. Criteria for employment creation and territorial decentralization of the economic growth shall be carefully applied as positive factors.

<sup>93</sup> 1984 GUIDELINES, *supra* note 2, at 4-5.

<sup>94</sup> FOREIGN INVESTMENTS, JURIDICAL FRAMEWORK, *supra* note 74, at 12.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 12-13.

<sup>99</sup> *Id.* at 13.

<sup>100</sup> *Id.* at 14. The FIC also has set forth guidelines designed to encourage international multilateral and bilateral economic cooperation. *Id.* at 16-20.



The Guidelines list priority activities that may receive up to 100 percent direct foreign investment. Priority undertakings, as delineated in the Guidelines, include the production of nonelectric equipment and machinery,<sup>101</sup> electric machinery and appliances,<sup>102</sup> electronic equipment and devices,<sup>103</sup> and equipment and material for transportation;<sup>104</sup> metal mechanics;<sup>105</sup> the chemical industry;<sup>106</sup> other manufacturing industries;<sup>107</sup> advanced technology services;<sup>108</sup> and the hotel industry.<sup>109</sup> The Guidelines state, however, that the enumerated activities are of an "indicative character" and that the list may be expanded by the Ministry of Commerce and Industrial Promotion "as a result of specific proposals or through the various groups of the national productive sectors."<sup>110</sup>

Certainly, one of the most important goals of the Guidelines is to encourage national technological development. As the FIC recognizes, however, preference will need to be given to "coinvestment" in order to "guarantee a *real* transference of technology."<sup>111</sup> Nevertheless, compared to large firms, small and medium-sized foreign companies are to receive "more flexible treatment" since it is presumed that their "investments and transference of technology carry lesser risks of dependency and may be valuable in agricultural and livestock sectors and certain branches of capital equipment and consumers' items."<sup>112</sup>

Increases in the percentage of foreign equity in Mexican companies by

<sup>101</sup> This category includes: agricultural machinery and implements, machinery for wood-working, machinery for food and beverages processing and packaging, machinery for the petroleum and petrochemical industries, numeric control machine tools for metal cutting and forming, textile industry machinery, machinery for plastic extrusion and molding, graphic arts industry machinery, and cranes, pulleys and the like. 1984 GUIDELINES, *supra* note 2, at 5-6.

<sup>102</sup> This category includes: high-power electric generators and engines, turbines for the processing industry, and high-power turbo-compressors. *Id.* at 6.

<sup>103</sup> This category includes: telecommunications equipment; magnetic tapes and discs for computation; computation equipment, parts and components; processing control and instrumentation equipment; assorted electronic materials, parts and components; engineering and scientific electronic equipment and devices; and household electronics. *Id.*

<sup>104</sup> This category includes: motorcycles and similar vehicles of more than 350 cc, internal combustion engines for boats and locomotives, and the construction and repair of boats. *Id.*

<sup>105</sup> This category includes: high-technology metallurgy, high-precision micro-foundry and specialized tools. *Id.*

<sup>106</sup> This category includes: pharmaceutical raw materials and active substances, synthetic resins and plastics, and specialties. *Id.*

<sup>107</sup> This category includes: precision and measuring devices, medical equipment and instruments, photography equipment and material, and new high-technology materials. *Id.*

<sup>108</sup> The only activity listed within this category is biotechnology. *Id.*

<sup>109</sup> The only activity listed within this category is construction and operation of hotels. *Id.*

<sup>110</sup> *Id.* at 5.

<sup>111</sup> FOREIGN INVESTMENTS, JURIDICAL FRAMEWORK, *supra* note 74, at 38 (emphasis added). Additionally, the FIC has stated that, "[i]n activities where association with foreign capital be deemed convenient, the policy of promoting foreign investment shall be applied to specific projects. In these cases competition among investors and purveyors of foreign technology will be promoted in order to make a selection among the better offers." *Id.*

<sup>112</sup> *Id.* at 15.

capitalization of debt, sale of stock or waiver of stock subscription rights of first refusal by Mexican shareholders may be granted for financially troubled industries on the list of national priorities. Alternative measures, however, must first prove unworkable, and the increase of capital must be indispensable to the survival of the company.<sup>113</sup> Furthermore, provision is made for the expansion of existing foreign companies in priority areas where such expansion will lead to the "modernization of the plants, the commitment of greater volumes of exports and increase the level of national integration in the production process."<sup>114</sup>

Another significant aspect of the Guidelines is the absence of a requirement to Mexicanize within a specified time period. Although the FIL does not deal with this issue, almost every exceptional allowance of majority foreign equity that was granted before the Guidelines were issued required Mexicanization, usually within 10 years.<sup>115</sup> The FIC has acknowledged, however, that "the process of Mexicanizing companies in which foreigners participate has in many cases resulted [in] an illusion with undesirable effects on industrial concentration, pricing policies and available investment resources."<sup>116</sup>

Some reports announcing the Guidelines have viewed them as an open invitation to any and all foreign investment. The Guidelines very clearly state, however, that only certain activities will be promoted.<sup>117</sup> Although other activities are generally welcome, the requirement of minority foreign equity will continue to apply. The activities promoted under the Guidelines are strategic in nature, in conformity with the goals of the NIDP, and even those activities will be analyzed by the FIC in terms of the criteria set forth in both the NIDP and the FIL.<sup>118</sup>

<sup>113</sup> 1984 GUIDELINES, *supra* note 2, at 7-8. The Guidelines contain a condition precedent to the increase of foreign capital in Mexican companies:

[T]he immediate program for economic reordering has designed alternative mechanisms that allow, in the cases where Mexican partners do not have resources for additional capital contributions, for the extension of the number of possible internal sources, be it by promoting the participation of other domestic investors or by means of financment or temporary contribution of risk capital with the development funds, bilateral funds of joint-ventures or by international financial agencies.

*Id.*

<sup>114</sup> *Id.* at 8. Additionally, the Guidelines state that "special attention" will continue to be given to in-bond industry. *Id.* at 7. See also *supra* note 57, and *infra* note 121 and accompanying text.

<sup>115</sup> Interviews with foreign investment attorneys, *infra* note 127 and accompanying text. See also *supra* notes 51-55 and accompanying text.

<sup>116</sup> FOREIGN INVESTMENTS, JURIDICAL FRAMEWORK, *supra* note 74, at 12. The FIC has also stated:

Effectiveness of Mexicanization operations will be watched; for national and selective application in those cases that offer sufficient elements to determine the Mexican share that will exercise real control over decisions of the Mexicanized enterprise, so no undesirable effects take place, particularly on policies of purchases, costs of transference and technological decisions.

*Id.* at 15-16.

<sup>117</sup> 1984 GUIDELINES, *supra* note 2, at 3.

<sup>118</sup> Interviews with FIC officials. See *infra* note 127 and accompanying text.

On August 30, 1984, the FIC published five new resolutions pursuant to the Guidelines.<sup>119</sup> Their purposes are twofold: to update the FIC's General Resolutions in accordance with the economic priorities of the NIDP and the Guidelines, and to improve and expedite the application process for majority foreign investments.<sup>120</sup> For example, the resolutions eliminate the need for FIC authorization for certain foreign investment activities in in-bond companies;<sup>121</sup> for the substitution of foreign directors, provided the ratio of domestic and foreign capital is not changed;<sup>122</sup> and, under certain circumstances, for the opening or relocation of specified establishments.<sup>123</sup> Additionally, the resolutions enlarge the powers of the Executive Secretary of the FIC, and he may authorize certain actions without prior FIC approval.<sup>124</sup>

The resolutions also include provisions that are expected to decrease significantly the amount of time required to complete an application for majority foreign capitalization.<sup>125</sup> Pursuant to the resolutions, applications to the FIC are to be negotiated through the Executive Secretary, who is then to submit them to the FIC for its formal acceptance within 30 business days of completion of the file.<sup>126</sup>

Announcement of the Guidelines has resulted in much speculation and misunderstanding. Research for this article included interviews that were graciously extended by bankers, corporations, the FIC and foreign investment legal practitioners. Their perceptions of the Guidelines assisted invaluable in the following analysis of Mexico's changing position on foreign investment.<sup>127</sup>

#### IV. MEXICO'S CHANGING POSITION

Contrary to past practice, the Guidelines were not published in the *Diario Oficial*, although they were announced in all the major newspapers and dis-

<sup>119</sup> See General Resolutions, *supra* note 92, "Considering," para. 2. See also 1984 GUIDELINES, *supra* note 2, at 3.

<sup>120</sup> See General Resolutions, *supra* note 92, "Considering," paras. 2-6, and Gen. Res. No. 1; interview with FIC officials, *infra* note 127 and accompanying text. See also Address by J. Treviño, American Bar Association Section of International Law and Practice, Winter Meeting (Dec. 1, 1984) (Update on Legal Aspects of Foreign Investments and Technology Transfer, supplementing Treviño, *supra* note 2) [hereinafter cited as Treviño, Address].

<sup>121</sup> See General Resolutions, *supra* note 92, Gen. Res. No. 2. See also *supra* notes 57 and 114.

<sup>122</sup> See General Resolutions, *supra* note 92, Gen. Res. Nos. 3 and 5.

<sup>123</sup> *Id.*, Gen. Res. No. 9.

<sup>124</sup> *Id.* As noted by Treviño, "the wording of these new Resolutions is complicated and must be studied carefully." Treviño Address, *supra* note 120.

<sup>125</sup> Interviews with FIC officials and foreign investment attorneys. See *infra* note 127 and accompanying text. Prior to the issuance of the resolutions, it could take approximately 2 to 4 months for the application to be analyzed by the technical committee and an additional 6 to 12 months to complete the negotiations and arrive at terms and conditions agreeable to both the investor and the FIC. See *supra* notes 82-86 and accompanying text. See also General Resolutions, *supra* note 92, Gen. Res. No. 1.

<sup>126</sup> See General Resolutions, *supra* note 92, Gen. Res. No. 1.

<sup>127</sup> Almost all the people interviewed requested that their names, and the names of their businesses, firms and banks not be cited, and that their statements not be quoted directly. Consequently, the citations respect these requests for anonymity, yet attempt to identify the

tributed in the form of a pamphlet.<sup>128</sup> Because the *Diario Oficial* is the official repository of all federal legislation, the failure to publish the Guidelines in it signified a definite effort to make clear that the change was one of policy. Even though the FIL allows for exceptions and the 49 percent limitation on foreign ownership is in essence only a general principle, the fact that the FIC had strictly enforced that limitation with few exceptions for the past 11 years had prompted the erroneous belief that this policy was the law.

When newspapers misleadingly interpreted the change as a new attitude "welcoming" foreign investment, some investors responded with guarded cynicism.<sup>129</sup> Since they had been led to believe that 49 percent was the legal maximum, some foreign investors would have preferred fixed rules in the form of a legislative revision. Fearful that this policy could just as quickly be replaced by past practices, these investors have been critical and have adopted a wait-and-see attitude. Additionally, foreign investors are concerned that the Government will later issue decrees restricting their future activities. The perception of both the newspapers and the critics is limited and faulty in many aspects.

Businesses incorporated under the 1984 Guidelines would retain their 100 percent foreign equity even if Mexico were to return to the 49-51 percent concept. It is extremely unlikely that a future decree could be applied retroactively. It is generally believed that the 1973 FIL cannot be so construed.<sup>130</sup> Moreover, although corporations could not expand by establishing new plants or adding new product lines without Mexicanizing under the FIL, additional protection has been available through the incorporation of an enterprise as a variable capital company<sup>131</sup> since approval of neither the

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type of person in question as closely as possible (e.g., foreign investment attorney, foreign banking official).

<sup>128</sup> 1984 GUIDELINES, *supra* note 2. Interestingly, while the Guidelines were not published, the correlative resolutions were. See *supra* note 92.

<sup>129</sup> See *supra* note 5 and accompanying text.

<sup>130</sup> Interview with foreign investment attorneys, *supra* note 127. Also, Gordon notes:

[T]here are some suggestions that [the FIL] is to be implemented only prospectively. Article 2 states that foreign investment in the capital of business enterprises, or in the acquisition of properties, and in all other operations to which the law refers, shall be subject to its provisions, suggesting neither a limitation to prospective application nor a permissible retroactive application. The law thus contains none of the fade out provisions characteristic of the Andean Common Market Decision 24.

Gordon, *supra* note 31, at 199 (footnotes omitted).

<sup>131</sup> Gordon, *supra* note 31, at 187; A. HOAGLAND, *supra* note 28, at C-2-3. Corporations and partnerships are permitted to operate with variable capital.

[A]n enterprise established with the right to variable capital has a fixed minimum capital, which has to be subscribed and at least 20 per cent paid up at the outset, and then a variable capital, which may be either fixed or an unlimited amount. Increases and decreases of the variable capital may be carried out by a mere vote of the shareholders, according to procedures established in the charter and by-laws, without amending the charter and without any additional formality, such as government permits, registration or publication. The FIL, however, governs capital structure and requires registration of changes in foreign shareholders and their interests.

FIC nor the Ministry of Foreign Relations is required to increase or decrease the variable portion of the capital. Consequently, corporations organized as variable capital companies have been able to expand and avoid pressure to Mexicanize when challenged to do so in the past.<sup>132</sup>

Second, Mexico has always "welcomed" foreign investment. It is the manner in which it has structured its foreign investment policies that has led some to believe otherwise. Even after enactment of the FIL in 1973, the amount of foreign investment increased significantly, particularly in the years 1976 and 1980.<sup>133</sup>

Also, the Guidelines do not signify an open door "welcome mat."<sup>134</sup> The Guidelines explicitly state that certain listed activities are being promoted. Certainly, it is not unreasonable for Mexico to refuse to accept indiscriminate foreign investment. A careful examination of Mexican policies and practices over the past century discloses a process that at times has had its divergences, but always with a purpose. An unrestrained open door policy was extended when foreign investment was viewed as beneficial and necessary for industrial growth. When the resultant foreign dominance of the economy became painfully apparent, however, measures were taken to alleviate the detrimental effects.<sup>135</sup> Nonetheless, the character, rather than the magnitude, of foreign investment was affected by the changing regulations.

As was uniformly noted by the bankers, lawyers and government officials interviewed, except for outright exclusions, laws really do not affect the magnitude of foreign investment in a country; other circumstances do, including political and economic views, labor rates and export possibilities. Regardless of the exclusion of foreign investment from certain activities, Mexico generally has been viewed as offering political stability, financial reliability in meeting its debt payments and a safe climate for investment.

Those interviewed were asked why, in their opinion, Mexico did not revise the FIL, and two responses predominated. First, the FIL already allows the FIC to grant exceptions when deemed beneficial to the national economy; there is therefore no need for a legislative revision.<sup>136</sup> Second, although Mexico is politically stable, there is a nationalistic sentiment remaining from the periods in which foreign investment was allowed to dominate the econ-

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*Id.* But see *supra* note 122 and accompanying text. See also Sonnenreich, *Protecting the United States Minority Shareholder in Joint International Business Ventures in Latin America*, 5 VA. J. INT'L L. 1 (1964).

<sup>132</sup> Gordon, *supra* note 31, at 187.

<sup>133</sup> Interviews with FIC officials, *supra* note 127.

<sup>134</sup> *Id.* See *supra* note 5 and accompanying text.

<sup>135</sup> See *supra* notes 27-63 and accompanying text.

<sup>136</sup> See *supra* note 1. Article 12 of the FIL authorizes the FIC to:

Increase or reduce, in terms of Article 5 hereof, the percentage in which foreign investment may participate in the various geographical areas or economic activities of the country, when there are no legal provisions or regulations requiring a definite percentage, establishing the terms and conditions under which said investment will be received.

*Id.* See *supra* notes 70-81 and accompanying text.

omy.<sup>137</sup> The enactment of a legislative revision would likely create apprehension that Mexico was once again indiscriminately allowing foreign investment to meet a short-term economic problem, and the political cost of such a reaction would be high. As it stands, the Guidelines have not been seen as a threat to Mexican industrialists, but rather as a progressive step toward increased technology.<sup>138</sup>

Furthermore, not only is such a revision unnecessary, it is also not in keeping with the goals of the FIC. The development of a rational economic plan that selectively promotes those industries deemed beneficial to the national economy requires flexibility sufficient to allow continuous reassessment of the country's needs. To lock the administration into further rigidity would preclude the very growth Mexico is striving to achieve.

Views differed over whether Mexico will press for Mexicanization in the future.<sup>139</sup> One of the corporate officials interviewed believes that the Government is likely to promote Mexicanization in specific areas in which it has an interest. An attorney with extensive experience in dealing with the FIC, however, disagrees on the basis that the Government has nothing to gain from Mexicanization at this time. In the past, nationalistic political motives prompted the policy, or the Mexicanization or nationalization was directed to strategic areas of the economy such as oil, mining and petrochemicals. Additionally, as was noted in the preceding section, Mexicanization in itself is no longer viewed by the FIC as a desirable goal. In fact, one of the elements of the new policy will be to examine the effectiveness of Mexicanization operations.<sup>140</sup>

Even if Mexico does later restrict the availability of investment incentives or press for Mexicanization, the fact remains that it is still an excellent investment choice. Almost every state offers a variety of investment incentives in addition to those provided by the federal Government, such as land, physical facilities and access to utilities; labor is still less costly than in most developing countries; and Mexico's marine, land and air transportation services and its geographical position as a neighbor of the United States help make it an attractive location.

There are, of course, advantages to incorporating with majority Mexican capital. An investment of 49 percent or less foreign equity may be organized immediately by simply registering with the FIR.<sup>141</sup> Although the new resolutions should significantly decrease the length of time required to obtain approval of majority foreign equity by the FIC, common sense suggests that the process will still take considerably longer than incorporating with 49 percent or less. More important, an investment with majority Mexican capital qualifies automatically for tax and other investment incentives pursuant to the 1972 Law for the Promotion of New and Necessary Industries and other

<sup>137</sup> See *supra* notes 14–17 and accompanying text. See also Treviño Address, *supra* note 120.

<sup>138</sup> Interviews with in-house counsel of Mexican industrial conglomerates, *supra* note 127. See also Mexico City News, May 3, 1985, at 25, cols. 2–3.

<sup>139</sup> See *supra* note 115 and accompanying text.

<sup>140</sup> FOREIGN INVESTMENTS, JURIDICAL FRAMEWORK, *supra* note 74, at 12, 15–16.

<sup>141</sup> See text at note 74 *supra*.

decrees. Although an investor may negotiate for incentives with both the FIC and the government of the state in which it will be operating even if majority foreign capitalization is planned, certain advantageous incentives are available only to companies with majority Mexican equity. Also, a company with majority Mexican equity will probably have easier access to administrative agencies and the various licenses required for imports.

Nonetheless, definite benefits may be gained by an investment of 100 percent foreign equity. One foreign banking official noted that there are both accounting and reporting advantages. In addition, a facility constructed by an investor entirely with foreign capital will have an asset worth more than the original investment after completion. If 51 percent is later sold to Mexican investors, the company would then be eligible for tax incentives.<sup>142</sup>

Majority foreign equity has other positive ramifications. From a lending point of view, the risk may be different. A bank is more likely to extend credit to a subsidiary of a company that is well known or with which the bank has had a prior working relationship.<sup>143</sup> Experience has proven that a parent company is much more likely to stand behind and support a wholly owned subsidiary, and any creditor is more comfortable lending to a party with which it is familiar, in contrast to a company newly formed with unknown management or shareholders.<sup>144</sup>

Last, 100 percent foreign equity is unavoidable in certain industries. A company that has developed expensive, unique technology will not share that asset with anyone else. Such an attitude does not spring from a fear of Mexicanization; the intangibility of technology precludes nationalization, as was aptly noted by the chief legal adviser of an industrial conglomerate.

The particular needs of the enterprise dictate the decision whether to invest with majority foreign equity. For investors in Mexico, the fact that the Guidelines promote specific industries and that the new resolutions should expedite approval by the FIC are obviously factors to be considered. Regulations, however, do not necessarily affect the economic and political situation of a company, which is usually the main factor taken into account in such a decision.<sup>145</sup> Yet regulations can provide an indication of the governing country's attitude and probable treatment. Mexico has decided that the activities delineated in the Guidelines are the ones that most benefit its economy, and it issued the Guidelines to notify the international community that in these areas it will be most accommodating in meeting the needs of the foreign investor.<sup>146</sup>

<sup>142</sup> Interview with foreign banking official, *supra* note 127. It was also suggested that control could still be retained, practically speaking, by later selling 51% on the stock market since the ownership of the 51% would then be diluted. Although this has happened in the past, governmental officials have admonished that it may not be an acceptable method of Mexicanization. Interview with foreign investment attorney, *supra* note 127.

<sup>143</sup> Interview with foreign banking official, *supra* note 127.

<sup>144</sup> Interview with foreign banking official, *id.*

<sup>145</sup> Interviews with FIC officials, *id.*

<sup>146</sup> As of May 3, 1985, there were 6,684 Mexican enterprises with foreign equity: approximately 2,780 have majority foreign equity, 3,349 have between 25% and 49% foreign equity,

It is still too soon to detect the impact of the Guidelines, especially when one remembers that there are many other factors that need to be considered in speculating on Mexico's short-term investment growth. At present, Mexican assets have been frozen as banks wait out the financial crisis and debt restructurings. Even if a company decided to locate in Mexico, the freeze alone could inhibit such a move since most prefer to invest with borrowed money. Also, many plants that had expanded in the early 1980s found themselves idle with the recession and are now trying to orient themselves for exports.

Nonetheless, the overwhelming majority of persons interviewed are optimistic in believing that the Guidelines signify an important change in attitude by the Mexican Government. Since 1973, its attitude had been defensive, shaped by an acute awareness of the detrimental effects of unrestrained foreign investment and dominance. The new attitude of selective promotion of specific industries must be viewed not in terms of the percentage of foreign participation alone but, more importantly, as an identification of the administration's goals for foreign investment, including more sophisticated technology, higher employment, substitution of imports and increased exports.

Mexico appears to have finally taken a macroeconomic approach toward foreign investment. It is an instrument that must be used rationally, for only

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and the remaining 555 have less than 24.9% foreign equity. Mexico City News, *supra* note 138, at 25, col. 3. "Last year, Combustion Engineering, Ford Motor Co., S.A. de C.V., Pricsa, Agromak and Black and Decker were among the principal projects requesting permission from the National Commission of Foreign Investments to operate with 100 percent foreign capital." *Id.*

International Business Machines Corp. (IBM) recently received approval for a 100% foreign equity project. The opinion page of the *Mexico City News* reported as follows:

The company's second proposal—called "substantially modified" by IBM itself—didn't budge on the issue of complete ownership but included enough compromises to make it acceptable to the Mexican government. The result will be a boon to Mexico's high-tech industry, to the nation's export income, and to the country's reputation for receptivity to investment from abroad.

The negotiations with IBM have been a test for both the De la Madrid administration and the company. IBM wanted to expand its Jalisco plant to include microcomputer production, but was determined to make its policy of full ownership of its overseas operations stick.

The end product of the tough bargaining process has enough to please everyone: IBM will invest more than 91 million dollars in capital equipment for the Jalisco plant over the next five years, a nearly 14-fold increase from the original offer of 6.6 million dollars. More than 90 percent of the plant's microcomputer production will be exported, at a company-estimated value of 620 million dollars in the next half-decade. Other provisions arrange for the employing and training of Mexican personnel and the inclusion of Mexican manufacturers and suppliers in the production process. In all, a fair agreement—one worth waiting for.

*Id.*, July 25, 1985, at 14, col. 1. In addition, the Government has eased restrictions on import licenses in hopes that "an increase in imports will force domestic manufacturers to improve the quality of their products and make Mexican goods more competitive on the world market." *Id.*, Aug. 27, 1985, at 7, col. 1.



by selectively promoting those industries beneficial to the nation will Mexico achieve the international standards of competitive technology and exports necessary for continued positive economic growth.

### CONCLUSIONS

Mexico's approach toward foreign investment is in a process of evolution. After veering from completely unrestrained reception to excessively protective and nationalistic restriction of foreign capital, the country appears to have reached an equilibrium. By announcing that it would actively promote foreign investment in specified industries, Mexico has placed the international community on notice of its intention to progress rationally toward further economic growth. Because its foreign investment regulations are largely the result of policy established by an administrative body with broad discretionary powers, it has been difficult in the past to predict how favorably a prospective enterprise might be received. According to FIC officials, however, one can now look to the criteria set forth in the NIDP and FIL and to the list of activities to be promoted under the 1984 Guidelines and obtain a clearer indication of the conditions to which a company will be subject and whether they are consistent with its interests.

The Guidelines, together with the resolutions of the FIC, signify a changing attitude. Up to 100 percent direct foreign investment will be considered in specified activities; increases in the percentage of foreign equity in Mexican companies may also be arranged; and foreign companies in priority industries will be permitted to expand under certain circumstances. Although the FIL had allowed for these exceptions, prior to the announcement of the 1984 Guidelines they had rarely been granted.

Foreign investments that are subject to these exceptions, however, will not be approved automatically. They will still need to be analyzed by the FIC in terms of the criteria set forth in the NIDP and FIL.

Whether to invest with 100 percent or 49 percent foreign capital is a decision dictated by the needs of the particular company; but the availability of a choice makes Mexico an even more attractive country in which to invest. Fear of future restrictions, such as requirements to Mexicanize, is unreasonable in view of the overall profit potential and should not be a determining factor in whether to select Mexico as an investment choice.

Although persons involved in the field are optimistic about this change in attitude, they are also aware that regulations do not substantially affect the magnitude of foreign investment in a country. Other circumstances have much greater significance, and owing to the current recession, it will take time to evaluate with accuracy the impact of these policies on Mexico's short- and long-term economic growth. The development of a rational plan that selectively promotes industries deemed beneficial to the national economy, however, should greatly assist Mexico in achieving competitive international standards.

## TRANSBOUNDARY HARM: THE INTERNATIONAL LAW COMMISSION'S STUDY OF "INTERNATIONAL LIABILITY"

By Daniel Barstow Magraw\*

The International Law Commission of the United Nations is currently studying a topic entitled "International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law" (hereinafter "international liability" or "topic"). That topic has proven to be as serpentine as its title suggests<sup>1</sup> and consequently is difficult to define. It is generally understood as encompassing, in particular, harmful transnational environmental effects of internationally lawful activities. This aspect alone has made the topic increasingly important, as demands on resources have intensified, technological advances have given rise to threats of widespread and even catastrophic transboundary harm, and the international community has grown more interdependent in other ways.<sup>2</sup>

Part I of this article discusses the history of the Commission's consideration of international liability and describes the Commission's current approach to it. Part II explores the relationship between international liability and two other topics the Commission is pursuing, state responsibility and international watercourses. Finally, part III examines the scope of the topic and the content of the obligation that the Commission has identified as central

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<sup>1</sup> One must approach that title with care. The full title is viewed by the Commission as composed of four elements essential to describing the topic: (1) liability, (2) "internationality," (3) injurious consequences, and (4) acts not prohibited by international law. See, e.g., Report of the International Law Commission to the General Assembly, 35 UN GAOR Supp. (No. 10), UN Doc. A/35/10 (1980) [hereinafter cited as 1980 Commission Report], reprinted in [1980] 2 Y.B. INT'L L. COMM'N, pt. 2 at 1, 160, UN Doc. A/CN.4/SER.A/1980/Add.1; [1980] 1 Y.B. INT'L L. COMM'N at 247, UN Doc. A/CN.4/SER.A/1980. In addition, the French-language version of the title differs in a possibly significant manner from the English-language version by using "*activités*" (activities) instead of "acts." The term "international liability" reflects the Commission's emphasis that the topic is concerned with "liability," which can be incurred regardless of the lawfulness of the underlying act, rather than "responsibility," which can arise only from an unlawful act. See *infra* text accompanying note 10. It is debatable whether the title accurately conveys that distinction.

<sup>2</sup> See, e.g., Handl, *State Liability for Accidental Transnational Environmental Damage by Private Persons*, 74 AJIL 525 (1980); TRENDS IN ENVIRONMENTAL POLICY AND LAW (M. Bothe ed. 1980).

to the concept of international liability for acts not prohibited by international law.

## I. GENESIS AND EVOLUTION OF THE TOPIC

### *Historical Overview*

The origins of the International Law Commission's consideration of international liability may be found in the Commission's study of the law of state responsibility. When the focus of that study shifted in 1963 from state responsibility for injuries to aliens to state responsibility more generally,<sup>3</sup> the report of the subcommittee that recommended the shift contained a footnote stating: "The question of possible responsibility based on 'risk', in cases where a State's conduct does not constitute a breach of an international obligation may be studied in this connexion."<sup>4</sup> Neither the genesis nor the precise meaning of that footnote is clear, but it is apparently the first recommendation from within the Commission that something in the nature of the topic on liability be considered.<sup>5</sup>

In 1963 the Commission appointed Roberto Ago as special rapporteur for state responsibility. In that role, Ago consistently took the view, which was expressed in the subcommittee, accepted by the Commission and adopted by Ago's successor as special rapporteur, Willem Riphagen, that his mandate was to study the general rules of state responsibility rather than rules that, if breached, would give rise to state responsibility.<sup>6</sup>

In taking that view, Ago, Riphagen and the Commission have distinguished between "primary" obligations, defined as "rules imposing on States, in one or another sector of inter-State relations, obligations the breach of which

<sup>3</sup> Report of the Sub-Committee on State Responsibility to the International Law Commission, UN Doc. A/CN.4/152 (1963) [hereinafter cited as 1963 Subcommittee Report], reprinted in [1963] 2 Y.B. INT'L L. COMM'N 227, 228, UN Doc. A/CN.4/SER.A/1963/Add.1; see Lillich, *The Current Status of the Law of State Responsibility for Injuries to Aliens*, in INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 1, 17 & n.140 (R. Lillich ed. 1983); Baxter, *Reflections on Codification in Light of the International Law of State Responsibility for Injuries to Aliens*, 16 SYRACUSE L. REV. 745, 746 (1965).

<sup>4</sup> 1963 Subcommittee Report, *supra* note 3, [1963] 2 Y.B. INT'L L. COMM'N at 228 n.3. The footnote appeared in a guide of points to be considered, which the Commission noted was merely a nonbinding aide-mémoire. Report of the International Law Commission to the General Assembly, 18 UN GAOR Supp. (No. 9) at 36, UN Doc. A/5509 (1963), reprinted in [1963] 2 Y.B. INT'L L. COMM'N, *supra*, at 187, 224.

<sup>5</sup> It is possible that the footnote refers instead only to acts that would have been unlawful except for the presence of a factor (e.g., force majeure) precluding wrongfulness. For related discussion, see *infra* text accompanying notes 100-103. That interpretation is unlikely because that idea could easily have been expressed clearly in connection with, or by reference to, that portion of the guide dealing with circumstances precluding wrongfulness, and because of the reference to "risk," which implies a broader inquiry in the nature of the topic on liability. See Report of the International Law Commission to the General Assembly, 28 UN GAOR Supp. (No. 10), UN Doc. A/9010/Rev.1 (1973) [hereinafter cited as 1973 Commission Report], reprinted in [1973] 2 Y.B. INT'L L. COMM'N 155, 169-70, UN Doc. A/CN.4/SER.A/1973; Summary records of the 25th session, 1 *id.* at 14 (remarks of Mr. Ago).

<sup>6</sup> See, e.g., 1963 Subcommittee Report, *supra* note 3, [1963] 2 Y.B. INT'L L. COMM'N at 227.

can be a source of responsibility," and "secondary" obligations, described as those which "purport to determine the legal consequences of failure to fulfil obligations established by the 'primary' rules."<sup>7</sup> Ago's and Riphagen's work has been limited to the general secondary rules of state responsibility for wrongful acts or omissions; it has not encompassed international liability, which is viewed as dealing with primary rules.<sup>8</sup> Nevertheless, the latter topic is a logical outgrowth of Ago's approach.<sup>9</sup>

The Commission has identified three reasons for studying international liability and state responsibility separately. The first is the distinction between primary and secondary rules just mentioned. Second, the Commission views state responsibility as deriving from prohibited (i.e., wrongful) acts or omissions; in contrast, international liability may stem from both prohibited and permissible acts or omissions.<sup>10</sup> Third, in the words of the Commission, "[a] joint examination of the two subjects could only make both of them more difficult to grasp."<sup>11</sup>

After prodding from the General Assembly,<sup>12</sup> the Commission established a working group in 1978 to consider the subject of international liability.<sup>13</sup> The working group submitted a report later that year,<sup>14</sup> and the Commission appointed Robert Quentin Quentin-Baxter as special rapporteur.<sup>15</sup>

Quentin-Baxter produced five reports between 1979 and his death in 1984.<sup>16</sup> Those reports, together with the reactions to them of the Commission

<sup>7</sup> Report of the International Law Commission to the General Assembly, 31 UN GAOR Supp. (No. 10) at 165, UN Doc. A/31/10 (1976), *reprinted in* [1976] 2 Y.B. INT'L L. COMM'N, pt. 2 at 1, 71, UN Doc. A/CN.4/SER.A/1976/Add.1 ("seek to determine . . ."). *See also* 1973 Commission Report, *supra* note 5, [1973] 2 Y.B. INT'L L. COMM'N at 169.

<sup>8</sup> *See infra* text accompanying notes 90-107.

<sup>9</sup> *See, e.g.,* Summary records of the 21st session, [1969] 1 Y.B. INT'L L. COMM'N 105-17, UN Doc. A/CN.4/SER.A/1969; Riphagen, *State Responsibility: New Theories of Obligation in Interstate Relations, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY* 581 (R. Macdonald & D. Johnston eds. 1983).

<sup>10</sup> *See, e.g.,* Preliminary Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law, UN Doc. A/CN.4/334 and Adds. 1-2 (1980) [hereinafter cited as Quentin-Baxter's preliminary report], *reprinted in* [1980] 2 Y.B. INT'L L. COMM'N, pt. 1 at 247, 250 & n.17, UN Doc. A/CN.4/SER.A/1980/Add.1.

<sup>11</sup> Report of the International Law Commission to the General Assembly, 34 UN GAOR Supp. (No. 10) at 228, 230, UN Doc. A/34/10 (1979) [hereinafter cited as 1979 Commission Report], *reprinted in* [1979] 2 Y.B. INT'L L. COMM'N, pt. 2 at 87, 88, UN Doc. A/CN.4/SER.A/1979/Add.1. The result mentioned in the text is not obvious. *See* Lillich, *supra* note 3, at 34 ("joint consideration . . . should have made both more comprehensible"); *cf.* Riphagen, *supra* note 9, at 581 (there were "valid practical reasons" for the severance).

<sup>12</sup> *See, e.g.,* Quentin-Baxter's preliminary report, *supra* note 10, [1980] 2 Y.B. INT'L L. COMM'N, pt. 1 at 247.

<sup>13</sup> Report of the International Law Commission to the General Assembly, 33 UN GAOR Supp. (No. 10), UN Doc. A/33/10 (1978) [hereinafter cited as 1978 Commission Report], *reprinted in* [1978] 2 Y.B. INT'L L. COMM'N, pt. 2 at 6, UN Doc. A/CN.4/SER.A/1978/Add.1.

<sup>14</sup> UN Doc. A/CN.4/L.284 and Corr.1 (1978). For section II of the report, see 1978 Commission Report, *supra* note 13, [1978] 2 Y.B. INT'L L. COMM'N, pt. 2 at 150-52.

<sup>15</sup> 1978 Commission Report, *supra* note 13, [1978] 2 Y.B. INT'L L. COMM'N, pt. 2 at 150.

<sup>16</sup> Quentin-Baxter's preliminary report, *supra* note 10; Second Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law, UN Doc. A/CN.4/346 and Adds. 1-2 (1981) [hereinafter cited as Quentin-Baxter's 2d report];

and the Sixth (Legal) Committee of the General Assembly,<sup>17</sup> are discussed in more detail below.<sup>18</sup> Milestones during that period included the presentation of a "Schematic Outline" in the third report in 1982, to serve as a proposed basis for the Commission's further work;<sup>19</sup> the preparation and publication in 1984 by the UN Secretariat of a study of state practice related to the topic of international liability;<sup>20</sup> and, also in 1984, the submission of the first five draft articles in Quentin-Baxter's fifth report.<sup>21</sup> The schematic outline received what may be described as tentative tacit approval in the Sixth Committee.<sup>22</sup>

In June 1985, Julio Barboza was appointed special rapporteur. He submitted a preliminary report early the following month. In that report, Barboza stated that he intended to review the topic "entirely," using the schematic outline as the "most important raw material," and that "certain basic questions remain open," including the scope of the concept of international liability.<sup>23</sup> It thus seems clear that the topic is susceptible to imminent redefinition and that the schematic outline is likely to play an important role—if only as a starting point—in Barboza's and the Commission's deliberations.

Before the Commission's progress is examined in detail, it is useful to highlight three sets of points. First, the work of Quentin-Baxter and the Commission is based on the general principle *sic utere tuo ut alienum non laedas*, i.e., the duty to exercise one's rights in ways that do not harm the interests of other subjects of law. In Quentin-Baxter's view, this principle is "a necessary ingredient of any legal system."<sup>24</sup> The topic thus implicates two potentially conflicting principles of international law: on the one hand, the sovereign right of a state to be free to engage in activities within its own territory and to regulate its own nationals; and on the other hand, the duty of a state to exercise its rights in a manner that does not unreasonably harm

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Third Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law, UN Doc. A/CN.4/360 and Corr.1 (1982) [hereinafter cited as Quentin-Baxter's 3d report]; Fourth Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law, UN Doc. A/CN.4/373 and Corr.1 (1983) [hereinafter cited as Quentin-Baxter's 4th report]; Fifth Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law, UN Doc. A/CN.4/383 and Add.1 (1984) [hereinafter cited as Quentin-Baxter's 5th report].

<sup>17</sup> The Sixth Committee, the legal committee of the General Assembly, contains representatives from each member state of the United Nations.

<sup>18</sup> See *infra* text accompanying notes 33–83.

<sup>19</sup> Schematic outline, Quentin-Baxter's 3d report, *supra* note 16, at 24–30 [hereinafter cited as schematic outline].

<sup>20</sup> Survey of State Practice relevant to International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law (prepared by UN Secretariat), UN Doc. ST/LEG/15 (1984) [hereinafter cited as Secretariat Survey].

<sup>21</sup> Quentin-Baxter's 5th report, *supra* note 16, at 1–2.

<sup>22</sup> See, e.g., Preliminary Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law, UN Doc. A/CN.4/394, at 4 (1985) [hereinafter cited as Barboza's preliminary report]. *But cf. infra* text preceding note 32.

<sup>23</sup> Barboza's preliminary report, *supra* note 22, at 4, 6, 8.

<sup>24</sup> 1980 Commission Report, *supra* note 1, [1980] 2 Y.B. INT'L L. COMM'N, pt. 2 at 159.

the interests of other states, including, significantly, the duty to regulate activities within its own territory. The broad goal that has resulted from that dichotomy is to allow as "much freedom of choice . . . as is compatible with adequate protection for the interests of affected States."<sup>25</sup> That goal is laudable, but it has proven difficult to realize.

Second, throughout its work, the Commission has considered that it is engaged primarily in codification, rather than progressive development.<sup>26</sup> It has based its work on the usual examples of state practice, including conventions such as the 1967 Outer Space Treaty,<sup>27</sup> court decisions such as the *Corfu Channel* case,<sup>28</sup> arbitral decisions such as the *Trail Smelter* award<sup>29</sup> and United Nations declarations such as the 1972 Stockholm Declaration on the Human Environment (particularly Articles 21, 22 and 23).<sup>30</sup> In his preliminary report, however, Barboza raised the question of "the degree of progressive development . . . which may be required by the novelty of the subject and the demands of equity."<sup>31</sup>

Third, discussions within the Commission reveal substantial disagreement among its members; and, although the topic has met with increasing approval, it is not clear that any consensus has yet been reached. Similar disagreement has been evident in the Sixth Committee's discussions.<sup>32</sup> Throughout his work on the topic, Quentin-Baxter trod a rather fine line in attempting to accommodate various conflicting views about some of its fundamental aspects and in assisting the Commission in refining its understanding of this challenging subject. His proposals must be viewed in that light.

#### *The Schematic Outline*

The schematic outline submitted by Special Rapporteur Quentin-Baxter in his third report, and resubmitted with proposed changes in his fourth

<sup>25</sup> Schematic outline, *supra* note 19, sec. 5, Art. 1. Section 5 is described elsewhere in the schematic outline as containing "principles." *Id.*, sec. 3, Art. 2. Section 5 continues in part as follows (footnotes omitted):

2. Adequate protection requires measures of prevention that as far as possible avoid a risk of loss or injury and, in so far as that is not possible, measures of reparation; but the standards of adequate protection should be determined with due regard to the importance of the activity and its economic viability.

3. In so far as may be consistent with the preceding articles, an innocent victim should not be left to bear his loss or injury; the costs of adequate protection should be distributed with due regard to the distribution of the benefits of the activity; and standards of protection should take into account the means at the disposal of the acting State and the standards applied in the affected State and in regional and international practice.

<sup>26</sup> See, e.g., Quentin-Baxter's 3d report, *supra* note 16, at 1.

<sup>27</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, done Jan. 27, 1967, 18 UST 2410, TIAS No. 6347, 610 UNTS 205.

<sup>28</sup> *Corfu Channel* (UK v. Alb.), Merits, 1949 ICJ REP. 4 (Judgment of Apr. 9).

<sup>29</sup> *Trail Smelter* (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905 (1938 & 1941).

<sup>30</sup> REPORT OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, STOCKHOLM, 5-16 JUNE 1972, pt. 1, ch. I (UN Pub. Sales No. E.73.II.A.14), reprinted in 11 ILM 1416 (1972).

<sup>31</sup> Barboza's preliminary report, *supra* note 22, at 8.

<sup>32</sup> See, e.g., Quentin-Baxter's 4th report, *supra* note 16, at 45.

report, elicited much comment in the Commission and the Sixth Committee.<sup>33</sup>

*Purpose.* The rules set forth in the schematic outline have a dual purpose: (1) to encourage the creation of conventional regimes for particular types or instances of transboundary harm, so as to increase the specificity of rules governing acts not prohibited by international law and decrease the incidence of confrontation between states; and (2) in the absence of such a regime, to assert a fourfold duty regarding transboundary harm to prevent, inform, negotiate and repair without a prior finding of responsibility for a wrongful act or omission.<sup>34</sup>

*Scope.* The topic, as defined in the schematic outline, covers any human activity within the territory or control of one state that gives rise or may give rise to loss or injury ("harm") to persons or things within the territory or control of another state.<sup>35</sup> Four criteria inhere in this definition: (1) the activity in question must be human activity; (2) it must be within the territory or control of a state; (3) it must give rise to or be capable of giving rise to harm; and (4) that harm must be to persons or things within the territory or control of another state.

The first criterion applies to all physical uses of territory that give rise to adverse physical transboundary effects in another state; the normal international legal rules regarding attribution and imputation<sup>36</sup> apparently do not apply. Economic activities such as devaluation, customs controls and monetary policy probably are not included.<sup>37</sup> Nor are nonhuman activities such as volcanic eruptions. The question is raised, but left unanswered, whether lack of action to remove a natural danger should be covered.<sup>38</sup>

The second criterion comprehends private activities on the basis of the state's capacity to regulate them.<sup>39</sup> As with the first criterion, the normal rules of attribution and imputation thus appear to be irrelevant. Activities of international organizations are not included.<sup>40</sup> As for activities on board a ship or aircraft of one state and not within the territory or control of another state—other than because of innocent passage or authorized overflight—they are deemed to be within the flag state's territory or control.<sup>41</sup>

<sup>33</sup> See Report of the International Law Commission to the General Assembly, 37 UN GAOR Supp. (No. 10), UN Doc. A/37/10 (1982) [hereinafter cited as 1982 Commission Report]; Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during its 37th Session, UN Doc. A/CN.4/L.352 (1983) [hereinafter cited as 1982 topical summary]. There was little discussion of the topic in 1983. See, e.g., Report of the International Law Commission to the General Assembly, 38 UN GAOR Supp. (No. 10), UN Doc. A/38/10 (1983).

<sup>34</sup> Quentin-Baxter's 4th report, *supra* note 16, at 17, 31, 52.

<sup>35</sup> Schematic outline, *supra* note 19, sec. 1, Art. 1.

<sup>36</sup> I.e., the rules regarding which actors, such as local governments, engage the state's responsibility.

<sup>37</sup> Quentin-Baxter's 4th report, *supra* note 16, at 48.

<sup>38</sup> Schematic outline, *supra* note 19, sec. 1, Art. 2; cf. *infra* text accompanying note 76 ("situations" in draft Art. 1).

<sup>39</sup> Quentin-Baxter's 4th report, *supra* note 16, at 54.

<sup>40</sup> *Id.* at 48.

<sup>41</sup> Schematic outline, *supra* note 19, sec. 1, Art. 1.

The result for ships in innocent passage and aircraft in authorized overflight is problematical because both the territorial state and the flag state may exercise control.<sup>42</sup>

Regarding the third criterion, loss or injury is defined in the schematic outline as meaning "any loss or injury, whether to the property of a State, or to any person or thing within the territory or control of a State."<sup>43</sup> Harm to a state's property is thus included; harm to *terra nullius* (i.e., territory that belongs to no state) is not. Nor, probably, is harm done to an international organization.<sup>44</sup>

The fourth criterion makes clear that, as to private persons and things belonging to private persons, the harm itself must occur within the territory or control of a second state. The Commission does not intend to cover a state's treatment of aliens within its own territory.<sup>45</sup> As for the concept of "control," as used in this criterion, it suggests difficult questions for which there are as yet few answers.<sup>46</sup>

*The "Compound 'Primary' Obligation."* The schematic outline contains a "compound 'primary' obligation" consisting of a series of four duties: to prevent, inform, negotiate and repair.<sup>47</sup> Those duties are based in large part on the concepts of cooperation, good faith and *bon voisinage* between the "acting state" (also referred to as the "source state") and the "affected state" (i.e., the state that is being or may be harmed).<sup>48</sup> The "compound 'primary' obligation" is composed of both procedural and substantive elements.

The first level of duty—which is actually a continuing duty—is that the source state is required to take "measures of prevention that as far as possible avoid a risk of loss or injury."<sup>49</sup> The duty to prevent is not defined or identified in the same structural format as the duties to inform, negotiate and repair, and it is not mentioned frequently.<sup>50</sup> Nevertheless, the duty to prevent is intended to play a major role in affecting states' behavior.<sup>51</sup>

Failure to prevent per se is not wrongful under the rules of the schematic outline and does not give rise to a right of action under those rules.<sup>52</sup> The international legal effect of a failure to prevent devolves on the source state if harm eventually occurs and no conventional regime governs the situation. In that event, the failure of the source state to take preventive steps may work against it when the amount of reparations it is to make is determined.<sup>53</sup>

<sup>42</sup> For the treatment of this issue in the draft articles, see *infra* note 80.

<sup>43</sup> Schematic outline, *supra* note 19, sec. 2, Art. 2.

<sup>44</sup> See Quentin-Baxter's 4th report, *supra* note 16, at 48. *But cf. id.* at 54.

<sup>45</sup> See, e.g., Quentin-Baxter's 3d report, *supra* note 16, at 19.

<sup>46</sup> See *infra* text accompanying notes 79–80.

<sup>47</sup> Quentin-Baxter's 4th report, *supra* note 16, at 29. The series of duties also has been called the duty to "prevent [or avoid], minimize and repair." See, e.g., *id.* at 48.

<sup>48</sup> Relevant state practice is described in the Secretariat Survey, *supra* note 20. With respect to the duty to inform, for example, see *id.* at 25–53, 158–91.

<sup>49</sup> Schematic outline, *supra* note 19, sec. 5, Art. 2.

<sup>50</sup> *Id.*, sec. 5, Art. 2; sec. 6, Arts. 4, 9 and 14; sec. 7.

<sup>51</sup> See, e.g., Quentin-Baxter's 4th report, *supra* note 16, at 29–38; Quentin-Baxter's 3rd report, *supra* note 16, at 4.

<sup>52</sup> Quentin-Baxter's 4th report, *supra* note 16, at 53.

<sup>53</sup> Schematic outline, *supra* note 19, sec. 7, Art. 1.4; see *id.*, sec. 3, Art. 3 ("remedial measures").



The second level of duty incumbent on the source state is to provide the affected state with "all relevant and available information" when it is or may be harmed by an activity occurring within the source state's territory or control; a partial exception allows the withholding of information if "necessary" for reasons of national or industrial security.<sup>54</sup> There is concomitant provision for advisory fact-finding machinery. When the affected state proposes fact-finding, the source state must cooperate in good faith to reach agreement regarding the details of the inquiry.<sup>55</sup> Inexplicably, and perhaps inadvertently, no parallel duty is stipulated for the affected state when the source state proposes fact-finding; such a duty should be specified. Each state is to contribute to the cost of fact-finding on an equitable basis<sup>56</sup> and, unless otherwise agreed, joint fact-finding machinery is to be established (although its composition is not spelled out in the schematic outline).<sup>57</sup>

Failure to comply with the duty to inform—which is a continuing duty<sup>58</sup>—does not give rise to a right of action.<sup>59</sup> However, to the extent that the source state has failed to provide information, the affected state is to be given "liberal recourse" to inferences of fact and circumstantial evidence in making a case for actual or potential harm when it is determined whether reparations are required. Such "liberal recourse" appears to be a step towards a *res ipsa loquitur* approach and may be modeled on the *Corfu Channel* case, which contains identical language.<sup>60</sup> Furthermore, failure to inform might increase the amount of any reparations required.<sup>61</sup>

The third stage of duty is that, under certain circumstances and at the request of any source state or affected state, the states are obliged to "enter into negotiations" regarding the necessity and form of a conventional regime to deal with the situation.<sup>62</sup> Unless they otherwise agree, the negotiations shall apply "principles" enumerated in section 5 of the schematic outline,<sup>63</sup> shall "take into account, as far as applicable, any relevant factor," including the 17 factors identified in section 6 of the schematic outline,<sup>64</sup> and "may be guided by reference to any of the [12] matters" listed in section 7 of the schematic outline.<sup>65</sup>

As with the first two duties, failure to take any step required by the duty to negotiate does not give rise to a right of action. Failure to negotiate, however, might increase the amount of any reparations to be made.<sup>66</sup> If an

<sup>54</sup> *Id.*, sec. 2, Arts. 1, 3; see *infra* text accompanying notes 151–154.

<sup>55</sup> Schematic outline, *supra* note 19, sec. 2, Art. 2.

<sup>56</sup> *Id.*, sec. 2, Art. 7. If a source state withholds information for security reasons, it must provide a "clear indication" of the dangers and reveal that it is withholding information.

<sup>57</sup> *Id.*, sec. 2, Art. 6.

<sup>58</sup> Schematic outline, *supra* note 19, sec. 2, Art. 2.

<sup>59</sup> Quentin-Baxter's 3d report, *supra* note 16, at 16.

<sup>60</sup> Schematic outline, *supra* note 19, sec. 5, Art. 4; *Corfu Channel*, 1949 ICJ REP. at 18.

<sup>61</sup> Quentin-Baxter's 3d report, *supra* note 16, at 15 and 16.

<sup>62</sup> Schematic outline, *supra* note 19, sec. 3, Art. 1(c).

<sup>63</sup> *Id.*, sec. 3, Art. 2. Portions of section 5 are set out *supra* at note 25 and accompanying text.

<sup>64</sup> Schematic outline, *supra* note 19, sec. 3, Art. 2.

<sup>65</sup> *Id.*

<sup>66</sup> Quentin-Baxter's 3d report, *supra* note 16, at 16.

agreement is reached, the source state's obligations will be satisfied in accordance with the agreement.<sup>67</sup>

Pursuant to the fourth, and final, stage of duty, if no conventional regime has been agreed upon and if harm occurs, the states involved must negotiate in good faith to determine their "rights and obligations," and reparations shall be made unless "it is established" that making reparation does not accord with their "shared expectations."<sup>68</sup> If reparations are required, the amount is to be determined according to a balance-of-interests test, taking into account the "shared expectations" of the states involved, the principles, factors, and matters enumerated in sections 5, 6 and 7, and the states' actions with respect to the duties to prevent, inform and negotiate.<sup>69</sup> The duty to make reparations thus is not equivalent to a rule of strict liability, but it approaches, and may be identical to, strict liability if the harm was unpredictable or if the harm was predictable and the source state ignored the first three duties completely.

The ultimate failure, nonperformance of the duty to make the required reparations in the event of harm, engages the responsibility of the source state for wrongfulness.<sup>70</sup>

*Dispute Settlement; Obligations Arising from Other Sources; Local Remedies.* The schematic outline refers to dispute settlement but does not provide any details.<sup>71</sup> Obligations or rights arising from sources other than the proposed articles on international liability are not to be affected by the rules in the schematic outline.<sup>72</sup> That is, those rules are not meant to substitute for conventional or customary international law rules that engage state responsibility. There is no requirement that local remedies be exhausted.

*Modifications Proposed in the Fourth Report.* In his fourth report, Quentin-Baxter responded to the reactions to his third report by the Commission and the Sixth Committee by proposing to modify the schematic outline as follows: (1) the scope of the topic would be confined to physical activities giving rise to physical transboundary harm; (2) the principles and factors in sections 5 and 6 of the schematic outline would be reworked on the basis of a detailed examination of state practice, which would determine how closely the proposed remedies would approach the strict liability standard; and (3) much greater account would be taken of the way states interact as members

<sup>67</sup> Schematic outline, *supra* note 19, sec. 3, Art. 3.

<sup>68</sup> *Id.*, sec. 4, Arts. 1, 2.

<sup>69</sup> *Id.*, Art. 3.

<sup>70</sup> Quentin-Baxter's 3d report, *supra* note 16, at 16.

<sup>71</sup> Schematic outline, *supra* note 19, sec. 8.

<sup>72</sup> *Id.*, sec. 1, Art. 3. Quentin-Baxter stated:

The distinctive feature of the present topic is that no deviation from the rules it prescribes will engage the responsibility of the State for wrongfulness, except ultimate failure, in case of loss or injury, to make the reparation that may then be required. In a sense, therefore, the whole of this topic, up to that final breakdown which at length engages the responsibility of the State for wrongfulness, deals with a conciliation procedure, conducted by the parties themselves or by any person or institution to whom they agree to turn for help.

of international organizations in setting forth the procedures in the schematic outline.<sup>73</sup>

### *Draft Articles 1-5*

The five draft articles submitted by Quentin-Baxter in 1984 were under consideration by the Commission at the time of his death. Draft Article 1, regarding scope, reads as follows: "These draft articles apply with respect to activities and situations which are within the territory or control of a State, and which do or may give rise to a physical consequence affecting the use or enjoyment of areas within the territory or control of any other State."<sup>74</sup> That definition includes three express limitations. First, there must be a "transboundary effect," i.e., the effect must be felt within the territory or control of one state, but arise as a consequence of an activity or situation occurring, *wholly or partly*, within the territory or control of another state. Second, there must be a physical consequence, i.e., the activity or situation must have a physical effect and a physical quality, and that effect must flow from that quality via a "physical linkage."<sup>75</sup> (The last-mentioned criterion apparently requires that the transboundary effect occur or be transmitted via natural physical media, such as atmosphere, water or earth, rather than via economic, political or cultural media.) Third, there must be an effect on use or enjoyment by the affected state.

Draft Article 1 is thus more restrictive than the schematic outline in some senses, e.g., in requiring a "physical" transboundary effect before the topic is engaged. In another sense, however, the article is more expansive, because of the inclusion of "situations" in the phrase "activities and situations." Quentin-Baxter indicated that "situations" refers to both man-made (e.g., oil slicks) and natural (e.g., fire, flood, pests, disease) events, that the relationship between "situations" and "activities" can be intimate and intricate, and that, with respect to "situations," the "dynamic element is supplied by the need of the affected State, rather than the interest of the source State."<sup>76</sup> There is some indication that he did not envisage the application of a duty to repair to transboundary harm arising from a "situation."<sup>77</sup>

Draft Article 1 calls for making some fine distinctions. For example, Quentin-Baxter stated that the manufacture and sale of household detergents does not fall within the topic, even though the use of such detergents "inevitably contaminate[s] waste water" and the flow of such wastewater into an international watercourse produces "a physical consequence with pronounced transboundary effects."<sup>78</sup>

<sup>73</sup> Quentin-Baxter's 3d report, *supra* note 16, at 48. For Barboza's views on changes in the approach of the schematic outline introduced by draft Article 1, see Barboza's preliminary report, *supra* note 22, at 6.

<sup>74</sup> Quentin-Baxter's 5th report, *supra* note 16, at 1.

<sup>75</sup> *Id.* at 12-14.

<sup>76</sup> *Id.* at 27-28.

<sup>77</sup> UN Doc. A/C.6/39/SR.41, at 18 (1984). *But cf.* Quentin-Baxter's 5th report, *supra* note 16, at 27 (referring to an "equitable allocation of costs").

<sup>78</sup> Quentin-Baxter's 5th report, *supra* note 16, at 16.

It is evident from the wording of draft Article 1 that the concept of "territory or control" was to have been of primary importance. Draft Article 2 attempts a "partial definition" of that term,<sup>79</sup> which is set forth in the margin,<sup>80</sup> but the definition provides detail only about a few peripheral aspects without getting to the heart of the concept of "territory or control," and thus is potentially extremely broad.

Draft Article 3 provides that the rules in the draft articles are subject to any international agreement pertaining to the activity or situation at issue. That article reflects both the goal of encouraging the formation of conventional regimes to deal with specific issues and the view that the "normal" method of discharging a source state's duty is by reaching agreement with affected states.<sup>81</sup> Draft Article 4 states that the fact that the proposed articles do not specify when transboundary harm arises from a wrongful act or omission does not affect the operation of any other rule of international law (e.g., one that prohibits the act in question).<sup>82</sup> Finally, draft Article 5 provides that the fact that the draft articles do not apply to the rights and obligations of international organizations does not imply either that rules regarding international organizations are different or that the mere involvement of an international organization in an activity also involving states results in the application of different rules to states with respect to that activity.<sup>83</sup>

#### *Special Rapporteur Barboza's Preliminary Report*

In his preliminary report, Special Rapporteur Barboza disclaimed any intent to reopen the "general discussion" of international liability in his thorough review of the topic. He identified as an open question "the definitive scope of the topic, which so far appears to have attracted a certain consensus as regards article 1 of the fifth report, and the concept of 'control', etc."<sup>84</sup> In addition, he identified as questions that might be "specially examined" the following: (1) the point at which a state can be considered responsible for the consequences of activities carried out in its territory, possibly with reference to concepts such as foreseeability; (2) the criterion

<sup>79</sup> *Id.* at 1, 6. Draft Article 2 also defines the terms "source State," "affected State," "transboundary effects" and "transboundary loss or injury." *Id.* at 1.

<sup>80</sup> Draft Article 2, *id.*, defines "territory or control" as follows:

"Territory or control"—

In relation to a coastal State, extends to maritime areas in so far as the legal regime of any such area vests jurisdiction in that State in respect of any matter;

In relation to a State of registry, or flag State, of any ship, aircraft or space object, extends to the ships, aircraft and space objects of that State while exercising a right of continuous passage or overflight through the maritime territory or airspace of any other State; and

In relation to the use or enjoyment of any area beyond the limits of national jurisdiction, extends to any matter in respect of which a right is exercised or an interest is asserted.

<sup>81</sup> *Id.* at 2 and Adds. 8–9.

<sup>82</sup> *Id.* at 2.

<sup>83</sup> *Id.*

<sup>84</sup> Barboza's preliminary report, *supra* note 22, at 6, 8. See also text at note 23 *supra*.

of "shared expectations," which appears in the schematic outline; (3) the effectiveness or value of procedures set out in the schematic outline, which, if neglected by the source state, do not engage its responsibility; (4) the possibility of placing greater emphasis on the duty to make reparation; (5) the role of international organizations; and (6) the five draft articles proposed by Quentin-Baxter, to determine whether Barboza should resubmit them, possibly with modifications.<sup>85</sup> Barboza also stated that he "will give careful attention to the concern repeatedly expressed in [the Commission and the Sixth Committee] about the interests of the developing countries."<sup>86</sup>

Neither the Commission nor the Sixth Committee discussed Barboza's preliminary report.<sup>87</sup>

## II. RELATIONSHIP BETWEEN INTERNATIONAL LIABILITY AND OTHER TOPICS

### *State Responsibility*

The Commission's decision to consider state responsibility and international liability separately, despite the latter topic's derivation from the former, has not met with universal approval. One commentator, Ian Brownlie, has objected to considering international liability at all on the grounds that it is "fundamentally misconceived" in a manner that "may induce a general confusion in respect of the principle of state responsibility."<sup>88</sup> In this connection, he states that much of state responsibility involves lawful activities that have caused harm and reiterates a position he has held for some time: "the normal principles of international responsibility . . . may sustain liability for the consequences of extra-hazardous operations."<sup>89</sup> He cites the Commission's reliance on the *Trail Smelter* award and the *Corfu Channel* case as evidence of confusion between primary and secondary rules: "In such cases it is the content of the relevant rules which is critical and a global distinction between lawful and unlawful activities is useless."<sup>90</sup> Furthermore, he finds no support in state practice and the jurisprudence of international tribunals for the concept of international liability for lawful activities.

Brownlie's view may stem from the possibility that the structure of the "compound 'primary' obligation" may blur the line between primary and secondary rules: there is no breach of an international obligation (and thus no engagement of the secondary rules of state responsibility) until a state fails to repair. The potential confusion arises because the duty to repair can

<sup>85</sup> Barboza's preliminary report, *supra* note 22, at 7-8.

<sup>86</sup> *Id.* at 8.

<sup>87</sup> No discussion was held in the Commission because Barboza had to return to Argentina for medical treatment.

<sup>88</sup> I. BROWNIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY (PART I)* 50 (1983). The relationship between state responsibility and international liability was the subject of a conference at The Hague in 1985, the papers from which will be published in 16 *NETH. Y.B. INT'L L.* (1985).

<sup>89</sup> I. BROWNIE, *supra* note 88, at 50 (quoting I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 285 (3d ed. 1979)). See also *id.* at 436, 443-45.

<sup>90</sup> I. BROWNIE, *supra* note 88, at 50.

be viewed as akin to a secondary rule that does not turn on wrongfulness, i.e., if there is no conventional regime and harm occurs, the duty to repair will obtain regardless of wrongfulness and its extent will be ascertained by reference to the rule itself rather than other rules.

It is not self-evident that any doctrinal mischief would be caused by an international legal rule with such a dual nature. Municipal law systems contain rules that both define a right or duty and prescribe a remedy;<sup>91</sup> and, although care must be taken in analogizing to municipal legal systems, international law should be no less able to accommodate such a hybrid.<sup>92</sup> Similarly, the fact that the "compound 'primary' obligation" includes three duties (to prevent, inform and negotiate) whose "breach" does not entail international wrongfulness—Riphagen has referred to these as "non-obligations"<sup>93</sup>—is not problematic as long as the other legal consequences of their "breach" are sufficiently clear. A related example is the nonbinding international agreement frequently encountered in international relations, whose utility and acceptability are widely recognized.<sup>94</sup>

Furthermore, the fact that the duty to repair may exist regardless of wrongfulness (even though the eventual failure to fulfill that duty *would* entail wrongfulness) is not necessarily problematic in the final analysis, although at least one difficulty does exist that requires attention. It might be argued that the question can be viewed as one of definition. Because the legal consequences of an activity necessarily depend on its nature, the gravity of its effects and the context in which it occurs,<sup>95</sup> it should not matter whether the activity is defined as "wrongful" and thus as giving rise to "state responsibility," or as not wrongful but nevertheless as giving rise to "state liability," provided that: (1) the activities falling within each set are properly chosen and sufficiently identified, and (2) the legal consequences of each activity are appropriate. According to this reasoning, the crux of the matter thus becomes determining the appropriate legal consequences of the particular activities.

<sup>91</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §90(1) (1979).

<sup>92</sup> International law contains one rule that is structurally similar in other respects to the "compound 'primary' obligation," i.e., that relating to state responsibility for injuries to aliens. In each, international wrongfulness does not arise immediately from the activity or act itself, but rather arises only if the injuring state fails to redress the injury. See, e.g., Borchard, *Theoretical Aspects of the International Responsibility of States*, in 1 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 223, 233-39 (1929). It is possible that the Commission's deliberations on international liability will lead to progress in dealing with the vexing issue of state responsibility for injuries to aliens, Lillich, *supra* note 3, at 31-35, and perhaps even shed light on the perennial question whether international accountability is based on fault or risk. See, e.g., Quentin-Baxter's preliminary report, *supra* note 10, [1980] 2 Y.B. INT'L L. COMM'N, pt. 1 at 251-52; Lillich, *supra*, at 29-33.

<sup>93</sup> See Riphagen, *supra* note 9, at 594-96.

<sup>94</sup> See, e.g., Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AJIL 296 (1977).

<sup>95</sup> The proposition in the text is inherent in the principle of proportionality. See also Chorzów Factory case (Jurisdiction), 1927 PCIJ, ser. A, No. 9, at 21; I. BROWNIE, *supra* note 89, at 457-64.

Although there is some logic to that argument, the prospect of disregarding the distinction between wrongful and nonwrongful acts under international law is troublesome. First, it would diminish the stigma attaching to states that engage in internationally wrongful activity. Although the effect of such stigmas is easily exaggerated, they do deter unlawful behavior in any legal system—a function that may be particularly important in the international legal system because of the lack of a centralized enforcement authority. Second, a state cannot normally avoid the prohibition against engaging in internationally wrongful acts by making monetary reparations to the state injured by those acts if that state objects to their continuance,<sup>96</sup> whereas such reparations may fulfill a state's obligations for nonwrongful acts, as is illustrated by the *Trail Smelter* arbitration.<sup>97</sup> Disregarding the distinction between wrongful and nonwrongful acts thus would necessitate a major doctrinal shift.

Those two considerations may be countered by the argument that one of the purposes and benefits of being able to proceed on a "liability" basis as envisioned in the schematic outline is the avoidance of having to make a determination of wrongfulness and thus the removal of that potential impediment (because of states' typical reluctance to admit to having acted wrongfully) to reaching a negotiated solution.<sup>98</sup> This argument is consistent with the doctrine of consent (i.e., that a state's consent can preclude wrongfulness of an otherwise prohibited act by another state),<sup>99</sup> at least if such consent is allowed to have retroactive effect. It does not account, however, for the fact that the schematic outline would apparently permit the activity to continue on the payment of monetary reparations even if a pertinent treaty regime were not established, i.e., even in the absence of consent. Such an outcome cannot be justified for internationally wrongful activities, at least in the absence of the doctrinal shift described above. The schematic outline should be modified to eliminate that possibility—a step that would inevitably lead to distinguishing, within the secondary aspect of the hybrid rule, between wrongful and nonwrongful acts. In that event, the duty to repair could exist regardless of wrongfulness, but wrongfulness would affect the type and extent of reparations required.

An argument supporting the propriety of secondary rules that apply to nonwrongful acts is based on the draft articles on state responsibility provisionally approved by the Commission in 1980, which include situations precluding wrongfulness. Article 35 of part 1 provides that even though wrongfulness of a state's action may be precluded by virtue of consent, force majeure, distress or necessity, such preclusion "does not prejudice any question that may arise in regard to compensation for damage caused by that

<sup>96</sup> See, e.g., Report of the International Law Commission to the General Assembly, 39 UN GAOR Supp. (No. 10) at 237–38, UN Doc. A/39/10 (1984) [hereinafter cited as 1984 Commission Report].

<sup>97</sup> 3 R. Int'l Arb. Awards at 1965, 1980.

<sup>98</sup> See Quentin-Baxter's 4th report, *supra* note 16, at 31.

<sup>99</sup> See, e.g., 1980 Commission Report, *supra* note 1, [1980] 2 Y.B. INT'L L. COMM'N, pt. 2 at 33.

act."<sup>100</sup> The Commission's commentary states that such compensation might be appropriate either with respect to the obligation to indemnify (which apparently is to be considered in part 2 of the articles on state responsibility) or with respect to the codification of the topic on liability.<sup>101</sup>

That the acts just described might fall within the scope of international liability, as defined without specific reference to acts whose wrongfulness is precluded, appears clear; and policy considerations support treating such acts in a manner similar, if not identical, to that in the schematic outline. For example, if a state takes an otherwise wrongful act out of necessity and consequently injures another state, there is no apparent reason for the second state to be compelled to bear the entire burden of the injury or for the first state to be free of the "duties" to forewarn the second state and to prevent or minimize the harm, i.e., to act as would be required by the schematic outline. Quentin-Baxter, however, took the position at one point that, as regards his topic, such acts constitute a separate and subordinate question to be dealt with later.<sup>102</sup> Riphagen, the special rapporteur on state responsibility, on the other hand, believes that the link between the two topics "becomes especially clear" in the context of Article 35.<sup>103</sup> Whichever route the Commission chooses (and it seems to this author that the location of the rule is unimportant), the treatment of acts whose wrongfulness is precluded and the relation between the rules in each topic and such acts should be clearly and consistently defined.

It is a peculiarity of the hybrid nature of the "compound 'primary' obligation" that the amount of reparations due is determined by that rule itself and that, at least to this extent, the rules on state responsibility would be "preempted." Such preemption would not occur if wrongfulness incurred through failure to make reparations affected the amount of reparations ultimately due or entailed other consequences. The latter effect appears likely only if the activity giving rise to state liability involves "massive pollution" of the atmosphere or seas. In that event, an international "crime" could be involved under Article 19(3)(d) of part 1 of the draft articles on state responsibility,<sup>104</sup> and the number of states that could assert the wrongfulness would increase dramatically.<sup>105</sup> Yet even if the amount of reparations due were determined "within" the hybrid liability rule, no doctrinal problems would have to arise. For example, the articles on state responsibility could specify that the articles on liability take precedence in this regard.<sup>106</sup> Similarly,

<sup>100</sup> *Id.*, [1980] 2 Y.B. INT'L L. COMM'N, pt. 2 at 34.

<sup>101</sup> *Id.* at 61, 111.

<sup>102</sup> Report of the International Law Commission to the General Assembly, 36 UN GAOR Supp. (No. 10), UN Doc. A/36/10 (1981) [hereinafter cited as 1981 Commission Report], reprinted in [1981] 2 Y.B. INT'L L. COMM'N, pt. 2 at 1, 149, UN Doc. A/CN.4/SER.A/1981/Add.1.

<sup>103</sup> Riphagen, *supra* note 9, at 594.

<sup>104</sup> See 1980 Commission Report, *supra* note 1, [1980] 2 Y.B. INT'L L. COMM'N, pt. 2 at 32.

<sup>105</sup> See, e.g., 1984 Commission Report, *supra* note 96, at 237.

<sup>106</sup> Provisionally approved draft Articles 3 and 5 on state responsibility might already so provide. See *id.* at 236.



the fact that a state may proceed under either of two sets of parallel rules does not pose difficulties, as long as the rules are consistent.<sup>107</sup>

The need for consistency in that and other respects does not seem particularly problematic. At least at the present stage, the same institutions are considering both topics, i.e., the Commission and the Sixth Committee. The individuals concerned are also the same, except that the special rapporteurs are different, which raises the danger of inconsistency since they play a prominent role in defining the contours and characteristics of topics. Thus far, however, the persons involved appear to have taken care to deal expressly with the relationship between the topics and to strive for consistency, and there appears to be no reason why they should not continue to do so.

Consistency might be threatened, however, if one topic is completed before the other. Work on the two topics should thus proceed in tandem. And if multilateral conventions are eventually contemplated, another possible source of inconsistency could be removed by having both topics considered by the same conference.

As has been mentioned, Brownlie has implied that at least two of the cases on which the concept of international liability is based actually involve state responsibility because in each of them the respondent state was found to have committed a wrongful act. In both cases, however, the state in question had failed to make reparations and therefore would have committed a wrongful act even if analyzed under the topic on liability as described in the schematic outline. The tribunals in those cases did not focus on the failure to make reparations but rather on the principle that no state has a right to allow its territory to be used in a manner that unreasonably harms another state. Nevertheless, the tribunal in the *Trail Smelter* arbitration mandated regulatory controls for Canada and made clear that, after complying with them, Canada would still be liable to make reparations if any harm occurred; i.e., Canada would have to make reparations for harm arising from wholly lawful activity.<sup>108</sup>

There may be some merit to Brownlie's assertion that international jurisprudence does not support international accountability for lawful activities. A full analysis of that question is beyond the scope of this article, but a few comments are in order. The survey compiled by the Secretariat contains an impressive compendium of relevant state practice that supports the schematic outline in many respects.<sup>109</sup> However, the bulk of that state practice, at least in its bilateral form, is European and North American. If the survey is accurate in this regard, the state practice may not be sufficiently representative to establish customary international law, irrespective of the requirement of *opinio juris*.<sup>110</sup> In addition, among judicial and arbitral decisions, the *Trail Smelter* award stands as a solitary beacon in its clarity on the issue of foremost

<sup>107</sup> See, e.g., Riphagen, *supra* note 9, at 597 *et seq.*; Quentin-Baxter's 4th report, *supra* note 16, at 29-30.

<sup>108</sup> 3 R. Int'l Arb. Awards at 1965, 1980.

<sup>109</sup> See Secretariat Survey, *supra* note 20.

<sup>110</sup> See, e.g., North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3 (Judgment of Feb. 20).

importance to international liability. The specificity of the schematic outline thus exceeds that of any substantial body of state practice and extrapolates in other ways as well.

On the other hand, international law attaches legal consequences in the nature of state accountability to activities that are not prohibited, which Brownlie acknowledged by his reference to ultrahazardous activities.<sup>111</sup> Legal consequences of other sorts may also flow from nonprohibited acts under international law.<sup>112</sup> The schematic outline seeks to expand the application of that phenomenon to physical activities and situations that, although perhaps not qualifying as "ultrahazardous," nevertheless involve a conflict of rights between states. Thus, although it is less "neat" than an approach that attaches no legal consequences to an activity unless it is either unlawful or passes the threshold of being "ultrahazardous," the approach in the schematic outline represents an overdue attempt to face up to an increasingly common fact of international coexistence.

That the attempt is "overdue," of course, amounts to an empirical judgment. Despite the deficiencies of current scientific understanding, it is not farfetched to conclude that the world ecosystem is threatened in a manner that promises to have substantial deleterious effects on mankind. For example, acid deposition,<sup>113</sup> increasing concentrations of ozone in the atmosphere and the "greenhouse effect" caused by increasing amounts of carbon dioxide in the air all pose significant dangers.<sup>114</sup>

Moreover, an issue such as acid deposition cannot be solved at the national level (e.g., the United Kingdom reportedly contributes more pollutants to the serious problem of acid deposition in Norway than Norway itself<sup>115</sup>). Nor is it amenable in most instances to bilateral or even regional resolution: the problem is global in scope and requires a global solution. Probably the most preferable would be a worldwide treaty. Failing that, the rules on international liability would serve as a useful fallback. They would serve a similar function with respect to the transboundary consequences of other activities that increasingly interfere with the use by states of their territory. Moreover, because the topic covers many such activities, it may allow smoother progress and a more balanced and equitable outcome than the

<sup>111</sup> See, e.g., UN Doc. A/C.6/39/SR.41, at 14-16 (1984) (Mr. Coughley, New Zealand, asserting that Quentin-Baxter's approach allows the accommodation of strict liability for ultrahazardous activities "within the structure of international law without threatening its unity").

<sup>112</sup> See, e.g., Riphagen, *supra* note 9, at 582, 584.

<sup>113</sup> The term "acid deposition" includes all forms of acid precipitation (rain, snow, mist, fog, dew, frost) as well as the dry deposition of sulfur and nitrogen compounds (SO<sub>2</sub>, nitrogen oxides, and sulfate and nitrate particles) that form acids when they contact surface water. Wetstone & Rosencranz, *Transboundary Air Pollution: The Search for an International Response*, 8 HARV. ENVTL. L. REV. 89 (1984).

<sup>114</sup> See, e.g., Wetstone & Rosencranz, *Transboundary Pollution in Europe: A Survey of National Responses*, 9 COLUM. J. ENVTL. L. 1-2 (1983). There is some evidence that ozone may be the culprit, instead of acid deposition, with respect to some plant damage. See 128 SCI. NEWS 279 (1985).

<sup>115</sup> Wetstone & Rosencranz, *supra* note 114, at 13-14.

separate consideration of a specific type or set of transboundary effects. As the Third UN Conference on the Law of the Sea demonstrated, a wide variety of activities may prevent the formation of rigid interest groups. The key will be to define the scope of the topic in a sufficiently modest manner so as not to invite noncompliance, in order to avoid undermining the effectiveness of international law generally.

### *International Watercourses*

Attention should also be directed to the Commission's study of the law of the non-navigational uses of international watercourses, because activities covered by that topic would fall under international liability if the two were not being considered separately. Moreover, in many respects the Commission has approached the two topics in a similar way: both are based on the potentially conflicting rights of sovereigns to be free to engage in activities in their own territory and still be free from interference from other states; both are marked by procedural and substantive aspects; both include duties to negotiate and to notify and inform; both encourage the formation of conventional regimes to deal with specific situations; both prescribe a balancing test that is not well-defined; and both entail international accountability for failure to fulfill their respective obligations.<sup>116</sup> As for the last point, the Commission's treatment of the topic on international watercourses does not make clear whether a breach of those obligations would result in "liability" in the sense of the topic on liability or in "responsibility" in the sense of the topic on state responsibility,<sup>117</sup> which highlights the possibility of confusion. There is an obvious need for consistency and for the Commission to address itself expressly to the relationship among those three topics.

### III. SCOPE OF THE TOPIC AND CONTENT OF THE "COMPOUND 'PRIMARY' OBLIGATION"

#### *Scope*

The scope of international liability (as described in the schematic outline and draft Articles 1-5) turns primarily on three questions. The first concerns the nature of transboundary harm, i.e., when is a transboundary impact sufficient to be a "transboundary effect" and thus to trigger the fourfold duty to prevent, inform, negotiate and repair? That question is particularly important because the topic potentially covers the set of all lawful activities—which is much larger than the set of all unlawful activities—and because so many lawful activities have effects in other states. Presumably, a *de minimis* rule would apply. Also, in their discussions the Commission and the Sixth

<sup>116</sup> See, e.g., Evensen (special rapporteur), First Report on the Law of the Non-navigational Uses of International Watercourses, UN Doc. A/CN.4/367, at 29-46 (1983).

<sup>117</sup> Compare Schwebel (special rapporteur), Third Report on the Law of the Non-navigational Uses of International Watercourses, UN Doc. A/CN.4/348, at 9 and 111 (1981), with *id.* at 124.

Committee have made clear that economic consequences, rather than just ecological effects in a narrow sense, are to be considered.<sup>118</sup> Beyond that, however, this critical issue is unsettled.<sup>119</sup>

The second question involves the extent to which a state is accountable for transboundary harm arising from private activities. Although Special Rapporteur Barboza has expressed some concern about this issue,<sup>120</sup> there appears thus far to have been a consensus that virtually all private activities will be covered. It is based on the theory that a state has a duty to regulate private activity within its "territory or control," and possibly on the ability of a state to require insurance or financial security on the part of private actors.<sup>121</sup> There may, however, be two limits on state liability for private activities. First, Quentin-Baxter stated that state liability "is not interrupted by any human or other failing within the conduct of an activity or situation, or by any extraneous circumstances—unless, perhaps, that circumstance is so overwhelming that the original activity or situation has no further relevance" (he indicated that sabotage might not satisfy that requirement).<sup>122</sup> State liability may also be limited on the theory that no state should be liable for what it cannot prevent.<sup>123</sup>

Allocating liability for private corporate activity raises special issues, including whether the state of incorporation, the state where the corporation has its principal place of business or headquarters, the state whose nationals are the majority shareholders (if there is such a state, which increasingly may not be the case) or the state where the activity at issue occurred—if those states differ—should be liable, or whether joint liability should be incurred.<sup>124</sup> Similarly, it is not clear how the involvement of a state in a "private" corporate activity would affect that state's liability, although it appears to this author that state involvement both should and would affect the outcome of the balance-of-interests test and thus the amount of reparations due.

The third critical question affecting the scope of international liability is the type of activities that should be included (assuming that those activities give rise to transboundary harm and that the actor is one whose activities may appropriately engage the state's liability). This question has been a source of contention throughout the Commission's consideration of the topic: for example, should it cover only environmental issues or should it extend to economic and monetary issues? In his preliminary report, Quentin-Baxter stated that the "main immediate reference is to developments within the

<sup>118</sup> Quentin-Baxter's 4th report, *supra* note 16, at 12–13; Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during its 38th Session, UN Doc. A/CN.4/L.369, at 144 (1984) [hereinafter cited as 1983 topical summary].

<sup>119</sup> See Secretariat Survey, *supra* note 20, at 14–18.

<sup>120</sup> Barboza's preliminary report, *supra* note 22, at 7.

<sup>121</sup> See, e.g., Secretariat Survey, *supra* note 20, at 211.

<sup>122</sup> Quentin-Baxter's 5th report, *supra* note 16, at 14–15.

<sup>123</sup> See 1981 Commission Report, *supra* note 102, [1981] 2 Y.B. INT'L L. COMM'N, pt. 2 at 147.

<sup>124</sup> See *infra* text accompanying notes 155–159.

field of the environment" and urged that the topic be expressly limited to the use or management of the physical environment.<sup>125</sup>

On the whole, the Sixth Committee and, to a lesser extent, the Commission did not favor that limit.<sup>126</sup> Some members argued—without providing any substantial justification—for the inclusion of "restrictive economic policies,"<sup>127</sup> "monetary activities"<sup>128</sup> and "transboundary economic problems"<sup>129</sup> (possibly involving such subjects as antitrust policies, restrictive tariffs and import quotas, inflationary and deflationary monetary policies, international lending policies, and tax laws affecting transfer pricing or transnational capital flows). Others asserted that medical and biological research and, more generally, "economic, industrial and other activities" should be included.<sup>130</sup> Those and other claims prompted counter-arguments against coverage of transboundary harm caused by newspaper articles, monetary devaluation and legitimate industrial or agricultural competition.<sup>131</sup> Quentin-Baxter himself continued to seek to limit the topic.

The reactions of the Commission and the Sixth Committee to his third and fourth reports led Quentin-Baxter to conclude that the sense of those bodies was to restrict the topic to physical activities giving rise to physical transboundary harm<sup>132</sup>—a scope that is far narrower than that sought by some Commission and Sixth Committee members but also broader than that initially suggested by the special rapporteur.

At least three considerations support limiting the topic to physical activities (including the use or management of the physical environment). First, the relevant state practice appears to be almost exclusively related to the physical use of the environment, as is documented by Quentin-Baxter's five reports and the survey conducted by the UN Secretariat.<sup>133</sup> Conversely, there does not appear to be any consensus regarding the other activities suggested for inclusion. Second, as a political matter, states are unlikely to agree to a set of rules that subject them to liability for activities that they consider purely economic or regulatory, such as those described above. Inclusion of those activities might therefore impair progress on the core of the topic, use of the physical environment. Third, some boundary to the topic is needed to

<sup>125</sup> Quentin-Baxter's preliminary report, *supra* note 10, [1980] 2 Y.B. INT'L L. COMM'N, pt. 1 at 265-66.

<sup>126</sup> See, e.g., Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during its 35th Session, UN Doc. A/CN.4/L.326, at 95, 99 (1981) [hereinafter cited as 1980 topical summary]; 1980 Commission Report, *supra* note 1, [1980] 2 Y.B. INT'L L. COMM'N, pt. 2 at 160; Quentin-Baxter's 4th report, *supra* note 16, at 9.

<sup>127</sup> 1980 topical summary, *supra* note 126, at 99.

<sup>128</sup> UN Doc. A/C.6/36/SR.41, at 7 (1981). <sup>129</sup> UN Doc. A/C.6/37/SR.48, at 9 (1982).

<sup>130</sup> UN Doc. A/C.6/37/SR.51, at 4-5 (1982).

<sup>131</sup> UN Doc. A/C.6/37/SR.46, at 4, 8, 22 (1982).

<sup>132</sup> See, e.g., 1982 Commission Report, *supra* note 33, at 194-95; 1983 topical summary, *supra* note 118, at 144; 1982 topical summary, *supra* note 33, at 43-44; Quentin-Baxter's 4th report, *supra* note 16, at 9 and 48.

<sup>133</sup> Secretariat Survey, *supra* note 20; Quentin-Baxter's five reports are cited *supra* in notes 10 and 16; see also *supra* text accompanying notes 26-31.

avoid the possibility of state liability for economic or political decisions that clearly cause transboundary effects but are overwhelmingly seen as not giving rise to liability, and that do not permit the formulation or application of a reasonable set of standards. Examples include the activities mentioned above, as well as decisions on economic or military aid or the use of a rare metal in weaponry.

At one point, Quentin-Baxter suggested another possible limit: restriction of the topic to situations involving a "lurking" rule of obligation whose application is precluded for some reason.<sup>134</sup> That idea was dropped, but it points to a possible confusion between the topics on state responsibility and international liability.

Another issue relating to scope is illustrated by the recent tragedy in Bhopal, India (the Bhopal disaster), in which gas leaking from the pesticide plant of a majority-owned subsidiary of a United States corporation (Union Carbide Corporation) killed and injured thousands of persons.<sup>135</sup> Even before the disaster, some members of the Commission and the Sixth Committee had suggested that the state of nationality of a multinational corporation should be liable when it "exports" dangerous industries to developing states and harm results.<sup>136</sup> Quentin-Baxter took the contrary position, arguing that states remain "primarily accountable" for things that happen within their own territory, that they may choose whether to allow the import of dangerous industries and that they can condition such import on the "exporting" state's retaining liability.<sup>137</sup> That position has been countered by arguments that developing states frequently do not have a realistic choice regarding whether to accept technology because of the political and economic imperative to develop and that they may be less able to regulate industry in other respects. Aside from any special considerations for developing states,<sup>138</sup> Quentin-Baxter's position is preferable, because the state where the activity occurred is in the best practical position by far to regulate that activity, because attempts to regulate extraterritorially might well be viewed, in the absence of an agreement permitting such regulation, as interfering with the sovereignty of the state in which the activity occurred, and because holding the "exporting" state liable might easily have undesirable effects on the

<sup>134</sup> Quentin-Baxter's 3d report, *supra* note 16, at 21. Quentin-Baxter mentions the regulation of competition in high seas fishing as an area in which such a "lurking" rule might exist. Quentin-Baxter's 2d report, *supra* note 16, Add.2 at 8.

<sup>135</sup> See, e.g., Robertson, *Introduction to the Bhopal Symposium*, 20 TEX. INT'L L.J. 269 (1985).

<sup>136</sup> See, e.g., Quentin-Baxter's 3d report, *supra* note 16, at 9-11.

<sup>137</sup> *Id.*

<sup>138</sup> The schematic outline contains several elements that may be intended to benefit developing states, and various Commission and Sixth Committee members have supported such an approach generally. See, e.g., Barboza's preliminary report, *supra* note 22, at 8. For a detailed discussion of those elements and of whether developing states should receive favorable treatment, see Magraw, *The International Law Commission's Study of International Liability for Nonprohibited Acts as it Relates to Developing States*, 26 WASH. L. REV. (forthcoming, June 1986), which concludes that standards pertinent to international liability should not be reduced, at least in the long run, solely because the source state is a developing state but that developed states should aid developing states in meeting those standards.



international flow of capital and technology (as is discussed immediately below).

The Bhopal disaster, however, may be distinguishable because some of the allegedly negligent activities occurred in the United States, the "exporting" state.<sup>139</sup> The question thus resurfaces whether, under these circumstances, such an activity is encompassed by the topic on liability. One issue is whether the allegedly negligent acts, e.g., training and plant design, have the physical characteristics required by draft Article 1. Although the answer is not certain, it seems that they do not: their alleged effect was physical (personal injury), and they were part of an activity that had a physical quality (manufacturing pesticides), but the effect did not flow from the United States via a "physical linkage" but rather via international trade or intercorporate communications.

A second question is whether it would be sound policy to hold the United States liable. A finding of liability might lead the United States and other states that export capital and technology to change their attitudes toward the regulation of foreign investment and technology transfer. The upshot could be tighter control over, and a corresponding decline in, those activities, which, ironically, could hamper the efforts of developing states to modernize and decrease their dependency on imports. Alternatively, states that export capital and technology might engage in negotiations to limit their liability. Such negotiations could lead to a new round of bilateral investment treaties—a result that is favored in principle by the schematic outline—but the developing states would most probably be forced by political and economic realities to accept treaty regimes that placed the liability on them. Moreover, international trade would likely be disrupted while the new relationships were being negotiated, and the costs of negotiating would be high. Furthermore, it is questionable whether the United States, or any state, can regulate activities such as those alleged to have occurred in the Bhopal disaster: is it feasible for a state to analyze the adequacy of training and design when the training is to be applied, and the design implemented, in another state? Finally, placing liability on the United States might tend to induce laxity on the part of the importing state (in this case India).

One last question regarding scope will be mentioned here. The Commission may take the view that acts that would be wrongful if wrongfulness were not precluded, e.g., by necessity, might entail international liability.<sup>140</sup> Because such acts obviously might not meet the criteria contained in draft Article 1, the Commission should make express provision for them under the topic if it decides to include them.

#### *Content of the "Compound 'Primary' Obligation"*

The content of the "compound 'primary' obligation" set forth in the schematic outline<sup>141</sup> raises many questions, three of which are addressed below.

<sup>139</sup> See, e.g., Westbrook, *Theories of Parent Company Liability and the Prospects for an International Settlement*, 20 TEX. INT'L L.J. 321, 322-29 (1985).

<sup>140</sup> See *supra* text accompanying notes 100-101.

<sup>141</sup> See *supra* text accompanying notes 47-70.

*Balance-of-Interests Test vs. Strict Liability.* The use of strict or absolute liability<sup>142</sup> rather than a balance-of-interests test is supported by the fact that many conventional regimes establish strict liability (sometimes limited) as the standard to be applied.<sup>143</sup> Quentin-Baxter answered that argument in part by claiming that the strict liability standard is not so universally accepted, even in conventions, that it can be viewed as having been accepted in state practice and that case law points instead towards a balance-of-interests test.<sup>144</sup> The schematic outline, of course, would not prevent states from deciding on strict liability as part of a conventional regime.

Among other commentators, Günther Handl has criticized Quentin-Baxter for his refusal to adopt a strict liability standard.<sup>145</sup> Handl posits that there is a finite set of effects typical of a particular ultrahazardous activity that, if they occur, should result in the application of a strict liability standard.<sup>146</sup> Quentin-Baxter responds to Handl in his fourth report.<sup>147</sup>

The decision whether or not to adopt a strict liability standard in all or selected situations is critical and deserves extended analysis. Only a few comments can be made here. Strict liability, as its name implies, is not sensitive to varying conditions, i.e., it cannot be modulated to take account of differences in circumstances. In this respect, it is not ideally suited to dealing adequately with the wide variety of situations now envisaged under the topic.

On the other hand, strict liability is relatively straightforward to apply and avoids the need to try to balance such numerous and amorphous interests as those found in the schematic outline—a process whose uncertainty is increased by the need to consider the undefined “shared expectations” of the states involved. One response is that it may be useful to know which standard is to be applied, regardless of how marshy that standard is. But that argument does not eliminate the defects of balancing tests, i.e., they allow easy manipulation by decision makers and do not lead to predictability of outcome.<sup>148</sup> The content of the balance-of-interests test—i.e., the criteria to be considered and their order of priority, if any—will determine how workable the test is. That content is expected to be further developed (and, one hopes, to become more certain) as the Commission continues its study.

*The Duty to Provide Information and the Security Exceptions.* The requirement that a source state provide “all relevant and available information” to affected

<sup>142</sup> L. F. E. Goldie has discussed the distinction between strict liability and absolute liability in the context of environmental damage. See Goldie, *Liability for Damage and the Progressive Development of International Law*, 14 INT'L & COMP. L.Q. 1189, 1201–20 (1965).

<sup>143</sup> E.g., International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, UN Regis. No. A14047, reprinted in 64 AJIL 481 (1970).

<sup>144</sup> Quentin-Baxter's 4th report, *supra* note 16, at 50–51.

<sup>145</sup> See Handl, *International Liability of States for Marine Pollution*, 21 CAN. Y.B. INT'L L. 85 (1983).

<sup>146</sup> Handl adopts C. Wilfred Jenks's approach to ultrahazardous activities. See Jenks, *Liability for Ultra-Hazardous Activities in International Law*, 117 RECUEIL DES COURS 105 (1966 I).

<sup>147</sup> See Quentin-Baxter's 4th report, *supra* note 16, at 39–44, and 48–55.

<sup>148</sup> The rules for delimiting maritime boundaries appear to be moving away from an interest-balancing approach. See *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1984 ICJ REP. 246 (Judgment of Oct. 12), reprinted in 23 ILM 1197 (1984).



states<sup>149</sup> is obviously in the interests of minimizing harm to affected states and of encouraging timely, informed and meaningful negotiations.<sup>150</sup> The Bhopal disaster is illustrative: if the United States had known that the Union Carbide Corporation was engaging in the allegedly dangerous training or plant design, notification of those dangers to India would have permitted India to take remedial action and might have averted the disaster entirely.

The wisdom of a national and industrial security exception<sup>151</sup> of some kind is obvious: predictably, states will not provide information that jeopardizes national or even industrial security, and a rule that did not make allowance for that reality would be weakened in all respects by noncompliance (if it were even agreed to in the first place). Nevertheless, it seems equally clear that attempts should be made to refine the present language and concepts.

First, there are no standards for determining whether information is "relevant," whether it is "available" (e.g., is a state required to collect information from private industry? to conduct scientific investigations?), and whether national or industrial security constitutes a sufficient "reason" for nondisclosure. Some guidance on the second of those questions can be gleaned from the *Corfu Channel* case, in which the International Court of Justice said that a state "may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal."<sup>152</sup> That guidance, however, is only minimal.<sup>153</sup> Because the standards are uncertain, because many states are allergic to disclosure for any reason and because colorable security claims might easily be devised in a wide variety of situations, interpretations that unduly protect the source state would probably be frequent.

Second, supplying even a "clear indication" of danger to the affected state when other information is withheld for security reasons, as the schematic outline requires, might compromise security in certain instances. Yet allowing the source state discretion to determine when that is the case would tend to vitiate the requirement.

Third, the requirement that the source state inform affected states of actual or potential harm resulting from private activities might necessitate

<sup>149</sup> Schematic outline, *supra* note 19, sec. 2, Art. 1.

<sup>150</sup> See generally R. KIRGIS, *PRIOR CONSULTATION IN INTERNATIONAL LAW* (1983) (which contains an excellent study of prior consultation as a possible means of obtaining consideration by decision makers of a state of the external effects of its proposed action, i.e., of effects such as transboundary pollution that are felt primarily by other states). For a discussion of information utilization with respect to international technology transfer, see Ashford & Ayres, *Policy Issues for Consideration in Transferring Technology to Developing Countries*, 12 *ECOLOGY L.Q.* 871, 891-95 (1985).

<sup>151</sup> Schematic outline, *supra* note 19, sec. 2, Art. 3.

<sup>152</sup> 1949 ICJ REP. at 22; see also *Trail Smelter award*, 3 R. Int'l Arb. Awards 1905 (1938 & 1941).

<sup>153</sup> The Secretariat Survey, *supra* note 20, at 31, concludes that the *Corfu Channel* case held that the standard of due care applicable to a state with respect to the activities of other international actors on its territory is "at least that of a negligence standard in the assessment of injurious impact."

the collection, compilation, analysis and retention of a wide variety and enormous amount of information from the private sector, some of which might not even be physically located in the source state. The extent of that requirement will depend, inter alia, on how the phrase "all relevant and available information" is interpreted, the degree to which the source state is held accountable for the activities of private persons and how the term "control" is defined. Various countries might object to that requirement—even aside from the security-exception issue—because of the administrative burden that it would represent,<sup>154</sup> concerns about privacy and government intrusion into the private sector, the fear that confidentiality would be compromised by "leaks" or concern that foreign investment (particularly in developing states) would be discouraged by the need to disclose information to an additional government. Moreover, governments might be forced to collect even more extensive information than the articles would eventually require to be disclosed to make the threshold determinations of which information is "relevant" to the injurious activity or situation and whether national or industrial security is threatened.

*Joint Liability and Multiple Harm.* The schematic outline focuses on a simple paradigm in which an activity in one state causes harm to another state.<sup>155</sup> That approach may be appropriate at the initial stage. The Commission's future deliberations should not be limited to that model, however, because other situations may occur: a joint activity of two or more states may cause harm to a third state (or more), or the activity of one state may cause harm to two or more states.

Indeed, joint activities potentially leading to transboundary harm (and possibly activities leading to harm in more than one state) most probably will increase in frequency. For example, a copper smelter is now being completed in northern Mexico (the Nacozari smelter) with equity participation by the Mexican Government, loan assistance from the Japanese Government and indirect investment (via a series of partially owned Mexican corporations) by a United States corporation, which will significantly increase sulfur dioxide (SO<sub>2</sub>) pollution in the western United States.<sup>156</sup> If we assume that no conventional regime governs the situation, the schematic outline offers little, if any, help in apportioning liability between Mexico and Japan, countries whose roles in "creating" the smelter, abilities to pay, technical capabilities and geographic relations to the point of emission differ drastically. Similarly, if we further assume that the SO<sub>2</sub> pollution affects not only the United States but also Canada, the schematic outline again fails to show how claims could be coordinated or damages allocated between the United States and Canada (which may not be inclined to cooperate because of their current disagreement over acid deposition<sup>157</sup>).

<sup>154</sup> See, e.g., UN Doc. A/C.6/37/SR.51, at 5 (1982).

<sup>155</sup> See, e.g., 1982 Commission Report, *supra* note 33, at 201.

<sup>156</sup> See, e.g., CONG. RESEARCH SERVICE, LIBRARY OF CONG., THE NACOZARI, MEXICO, COPPER SMELTER: AIR POLLUTION IMPACTS ON THE U.S. SOUTHWEST I (1985).

<sup>157</sup> See, e.g., N.Y. Times, Aug. 24, 1983, at A3, col. 4.

A related question concerns the possibility that the states in which a transnational corporation is incorporated or headquartered and in which its branch or subsidiary is located may be jointly liable for harm to a third state caused by that branch or subsidiary.<sup>158</sup> Indeed, the Nacozari smelter could raise this issue if a portion of the private ownership is held by nationals of a state other than the United States and Mexico. As for the indirect U.S. corporate investor, a different, but equally complicated, question arises: should Mexico and Japan be entitled to an offset for the failure of the United States to regulate its national? Activities performed under the auspices of an international organization (such as joint UN peacekeeping forces or joint mining ventures under the new International Sea-Bed Authority) suggest related questions. The Commission's work on state responsibility—in particular, regarding responsibility for aiding or coercing another state to perform an internationally wrongful act<sup>159</sup>—may be relevant in considering the issues raised in this part.

### CONCLUSION

The International Law Commission has progressed significantly in its study of international liability, especially in terms of roughing out partial boundaries for the topic. The schematic outline that new Special Rapporteur Barboza intends to use as his "most important raw material" contains the germs of many useful ideas, but fundamental questions remain. The proposed balancing test is at present too amorphous; on the other hand, the most obvious alternative, strict liability, is not sensitive to the varying conditions potentially covered by the topic. Basic questions about scope, joint liability, multiple harm and the duty to inform also have not yet been resolved.

The relationship between international liability and state responsibility is both promising and troubling. With respect to at least one aspect of that relationship, the schematic outline seems misconceived: it would apparently (but inappropriately) allow a state to persist in an unlawful act even without the consent of the injured state, as long as the acting state pays monetary reparations to the injured state. The crux of the endeavor to separate the two topics contextually will be to maintain consistency between them, while still allowing their differences to be expressed. The need for consistency and the conceptual complexity of the two topics argue for not permitting progress on one topic to outpace development of the other and for expressly attending to the interaction of the two. That conclusion also applies to the Commission's study of the non-navigational uses of international watercourses. If attention is paid to these considerations, the Commission's studies of these topics may ultimately play a pivotal role in resolving critical problems confronting the international community and clarify heretofore perplexing areas of international law.

<sup>158</sup> See, e.g., 1982 Commission Report, *supra* note 33, at 196.

<sup>159</sup> 1980 Commission Report, *supra* note 1, [1980] 2 Y.B. INT'L L. COMM'N, pt. 2 at 33 (draft Arts. 27 and 28).

## EDITORIAL COMMENTS

### THE UNITED STATES SHOULD ACCEPT, BY A NEW DECLARATION, THE GENERAL COMPULSORY JURISDICTION OF THE WORLD COURT

April 7, 1986 marks the end of a notable 40-year experiment in international adjudication. On that date, the United States Declaration of acceptance of the general compulsory jurisdiction of the International Court of Justice terminates, according to the 6-month notice of termination delivered by the Secretary of State to the United Nations on October 7, 1985.

Together with that notice, the State Department issued a press release emphasizing that the United States was not pulling out of the World Court, and that it would continue to participate in the adjudication of treaties containing compromissory clauses and in cases referred by both parties to the Court.<sup>1</sup> Nevertheless, these consensual matters are quite different from compulsory jurisdiction. Domestic law would collapse if defendants could only be sued when they agreed to be sued, and the proper measurement of that collapse would be not just the drastically diminished number of cases but also the necessary restructuring of a vast system of legal transactions and relations predicated on the availability of courts as a last resort. There would be talk of a return to the law of the jungle.

The jungle metaphor has been mooted as a result of the U.S. termination. The United States seems to have relinquished its leadership role in promoting world peace through world law. In 1946, the United States consciously tried to set a good example by joining the Court's compulsory jurisdiction, but according to the State Department's aforementioned press release, "Unfortunately, few other states have followed our example. Fewer than one-third of the world's states have accepted the Court's compulsory jurisdiction. . . ."<sup>2</sup> Yet the substance of that "example" could well be questioned. Professor Thomas Franck has pointed out that the Connally reservation to the United States Declaration, a self-judging provision regarding jurisdiction, led many would-be joiners of the Court's compulsory jurisdiction to conclude that the example set by the United States was a hollow one and that this country did not take the World Court seriously.<sup>3</sup>

An even more misleading item in the State Department's press release was the statement, "We have never been able to use our acceptance of compulsory jurisdiction to bring other states before the Court, but have ourselves

<sup>1</sup> Dep't of State daily news briefing, DPC No. 178, Oct. 7, 1985, at 2, *reprinted in part in* 80 AJIL 164, 165 (1986) (issued concurrently with the text of the note of Secretary of State Shultz delivered to the Secretary-General of the United Nations on Oct. 7, 1985).

<sup>2</sup> *Id.* at 1, 80 AJIL at 164.

<sup>3</sup> Franck & Lehrman, *Messianism and Chauvinism in America's Commitment to Peace through Law* (to be published by the Senate Comm. on Foreign Relations).

been sued three times."<sup>4</sup> In fact, on several occasions since 1946 the United States considered bringing actions against other states in the World Court but eventually decided not to do so out of fear that those states would invoke the Connally reservation reciprocally. In no sense, however, was the United States disabled from suing.

Three major reasons, among others, argue in favor of reaccepting the general compulsory jurisdiction of the Court. First, in a precarious nuclearized world, not only does adjudication help prevent small disputes from escalating into major ones, but also its very possibility on the basis of compulsory jurisdiction helps modify conduct that otherwise could lead to a dispute. Given the enormity of the stakes and the paucity of international legal institutions, strengthening the World Court could be an extremely valuable investment. Second, the United States stands to benefit in years to come from actively espousing the claims of its nationals against foreign states in the World Court. Many such claims arise in settings ungoverned by treaty or compromissory agreement. The more the United States reaches out to the rest of the world—whether by investments abroad, tourism or the activities of multilateral corporations—the more useful will it be to have a forum where the United States can support private claims of its nationals subjected to unjust treatment abroad. Third, on a purely cost-benefit basis, the United States, as a law-abiding nation under a progressive Constitution, should have little to fear in being brought to account before a world tribunal. And in those few cases where the United States might lose, its willingness to lose gracefully would give it the moral right to expect and demand that other nations comply with adverse judgments against them and maintain their participation in the Court's compulsory jurisdiction.

Accordingly, I would like to suggest some ideas for a new United States Declaration. However, at the outset I acknowledge the force of an argument contained in a letter to me by Judge Abraham Sofaer, the Legal Adviser to the Department of State.<sup>5</sup> He refers to the Department's perception that the Court, in the jurisdiction phase of *Nicaragua v. United States*,<sup>6</sup> in effect transgressed verbal limitations on its own competence and jurisdiction. "Unfortunately," he writes, "clever drafting" cannot insure against the risk that the Court might refuse to give jurisdictional reservations their intended effect. In response, although I do not agree with all of the Court's reasoning in that case, and although I concede that the Court gave its own jurisdiction a liberal interpretation, I see no evidence that the Court ignored the clear meaning of words. But even if there were such a risk in the future, the ambit of risk would be limited by a proposed 6-month termination provision. Finally, with respect to the jurisdictional question of greatest sensitivity—cases involving armed hostilities—I shall suggest a middle ground that may serve

<sup>4</sup> Dep't of State, *supra* note 1, at 2, 80 AJIL at 164.

<sup>5</sup> Letter of Abraham D. Sofaer, Legal Adviser, Department of State, to Professor Anthony D'Amato (Dec. 3, 1985).

<sup>6</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Judgment of Nov. 26).

to reduce the strain otherwise placed on decisive linguistic delimitations of the Court's competence.

#### SUGGESTED DELETIONS

A new declaration would be materially improved if it omitted both the Connally and the Vandenberg reservations contained in the 1946 Declaration. The Connally reservation<sup>7</sup> inhibits the United States from bringing actions by giving the defendant almost unlimited power to avoid the suit. Even if the United States refrained from invoking the reservation in unreasonable contexts, as it did in the *Nicaragua* case, there is no assurance that defendant states would be so scrupulous reciprocally, as witness Bulgaria in the *Aerial Incident* case.<sup>8</sup>

The Vandenberg reservation,<sup>9</sup> requiring that all parties to a multilateral treaty that would be affected by a decision on the treaty be parties to the case, is unnecessary in view of the Court's intervention rules under Article 63 of its Statute, and excessively onerous considering the fact that most cases these days invariably include interpretation of provisions of that huge multilateral convention, the United Nations Charter. The Vandenberg reservation literally mandates that in all such cases where the United States is sued, the plaintiff must implead all the member states of the United Nations.

Whatever the United States might reserve in a new declaration, a bright new dawn for American support of the international rule of law would be signaled if the Connally and Vandenberg reservations were scuttled.

#### SUGGESTED ADDITIONS

An important addition to the 1946 Declaration would remove the disincentive from accepting the Court's compulsory jurisdiction that it gratuitously confers on other states. Under the old language, a state might reason that if it ever had cause to sue the United States, it could file its acceptance of compulsory jurisdiction a day or two before filing the lawsuit itself. Until then, it could remain immune to suit by the United States simply by withholding any open-ended acceptance of general compulsory jurisdiction. This disincentive could be avoided by adopting a provision, like the United Kingdom reservation,<sup>10</sup> that would allow suits against the United States only if

<sup>7</sup> Excepted are "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America." U.S. Declaration of Aug. 14, 1946, 61 Stat. 1218 (1947), reprinted in MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1982, at 23-24, UN Doc. ST/LEG/SER.E/2 (1983) [hereinafter cited as MULTILATERAL TREATIES].

<sup>8</sup> Case concerning the *Aerial Incident* of 27 July 1955 (U.S. v. Bulgaria), 1960 ICJ REP. 146 (Order of May 30). See Gross, *Bulgaria Invokes the Connally Amendment*, 56 AJIL 357 (1962).

<sup>9</sup> Excepted are "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction." MULTILATERAL TREATIES, *supra* note 7, at 24.

<sup>10</sup> Excepted are "disputes in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purposes of the dispute, or where the acceptance of the Court's compulsory jurisdiction on

the plaintiff state had adhered to the Court's compulsory jurisdiction for at least 12 months prior to the commencement of the suit.

Clearly, the most important substantive reservation in any new U.S. declaration would regard ongoing armed hostilities, the question that has so troubled the State Department in the *Nicaragua* case. Having withdrawn from the Court's compulsory jurisdiction as a result of that case, the United States surely would not rejoin on terms that would allow lawsuits similar to *Nicaragua's*. One may well ask why nations are so concerned about excepting cases regarding armed hostilities from adjudication. Are not such cases ideal occasions for settling conflicts in court instead of on the battlefield? Moreover, when matters have reached the point of military action, how much is there to fear from a court of law? Yet nations sometimes fall prey to a strange psychology, an extreme example of which is the proviso in the United Kingdom Declaration of February 28, 1940, excepting cases originating in events of the Second World War. One wonders, with bombs dropping on London, what made lawyers and government officials in their underground shelters so frightened by the prospect of a ruling on the legality of a war-related case by a court of law sitting at The Hague.

Whatever the motivational basis, the United States clearly has the right to carve out an exception for cases regarding armed hostilities. Yet if that or any other exception were unjustifiable or random, it would have a deleterious effect upon the ideal of international adjudication and thus be at odds with much of the impetus for making a new declaration in the first place. Fortunately, a principled argument can be made for an armed hostilities exception.

Suppose state *X* alleges that state *Y* has illegally commenced military hostilities against *X*, and obtains a judgment in the World Court that, among other things, orders the cessation of hostilities. If *Y* does not comply with the judgment, the Security Council may be faced with making a decision under Article 94(2) of the Charter whether to decide upon measures to be taken to give effect to the judgment. But under Article 39 of the Charter, the Security Council might decide that enforcement measures against state *Y* might endanger international peace and security, as compared to a policy of watchful waiting. The Security Council would thus be caught between enforcing international peace and security—its primary mission under the Charter—and enforcing a judgment of the judicial organ of the United Nations. This dilemma, arising out of the structure of the Charter itself, would normally be resolved politically by the Security Council one way or the other.

The possibility of the dilemma, however, indicates that an exception to the Court's compulsory jurisdiction that avoided the dilemma would be a principled exception. Yet simply excepting all cases of ongoing armed hostilities would be unnecessarily overbroad. The dilemma arises not because

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behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court." Declaration of the United Kingdom of Great Britain and Northern Ireland, Jan. 1, 1969, *id.* at 23.

the Court has jurisdiction over the same cases that the Security Council deals with—indeed, the Charter expressly contemplates such overlaps—but because, in the case I have imagined, the Court has issued an enforceable judgment. If the Court simply declared the rights and duties of the parties, and refrained from rendering an enforceable judgment or issuing judicial orders, there would be no clash between the Court and the Security Council.

This reasoning suggests that the Court issue only declaratory judgments in ongoing hostilities cases so that there would be no further need for enforcement. The proviso might read as follows:

*Provided further, that with respect to disputes relating to, or pleadings of any contesting Party that allege or refer to, ongoing armed hostilities or the threat or use of military force, the Court may only declare the rights and duties of the Parties under international law, and may not issue any order or enforceable judgment.*

Such a proviso, falling between jurisdiction and no jurisdiction, avoids the all-or-nothing consequence of construing an armed hostilities exception, and thus may ease any pressure on the Court to strain the ordinary meaning of words. If a case involves ongoing armed hostilities, the Court will not be disabled from dealing with it, but rather will have the significant role of articulating the applicable rules of international law. Such a proceeding, as well, will give the parties a chance to air their case in the restrained atmosphere of a courtroom and to vindicate, to the extent they are able, their international legal position.

Would such a proviso be compatible with the UN Charter and the Court's Statute? Surely, if a party to the Court's compulsory jurisdiction can refuse to accept that jurisdiction altogether, it should be able to accept any lesser jurisdiction. Article 94(1) of the Charter requires parties to comply with decisions of the Court but does not say that the Court may not render a declaratory judgment that falls short of a "decision" requiring compliance. Under the Statute, Article 36(2) refers to "legal disputes" and 38(1) says that the Court's function is to "decide . . . disputes," but this language does not preclude disputes over rights and duties that could be decided by a judicial declaration on the content of those rights and duties. A similar interpretation can be made regarding Article 59: "The decision of the Court has no binding force except between the parties and in respect of that particular case." If the phrase "binding force" means that a declaratory judgment will be binding with respect to the rules and principles articulated by the Court, then it is compatible with my suggested proviso. Regardless of all these arguments, and out of an abundance of caution, the United States might provide that if the proviso on declaratory judgments is declared invalid by the Court, it is to be automatically amended to exclude cases involving ongoing armed hostilities entirely from the Court's jurisdiction.

Finally, a new declaration should have a 6-month termination clause, which, by confining judicial damage to 6 months, should ensure that Western civilization as we know it will not have enough time to come to an end. An improvement on the 1946 Declaration would provide for a shorter period on the basis of reciprocity and might read as follows:



*Provided further*, that this declaration may be terminated with effect at the moment of expiration of six months after notice has been given to the Secretary-General of the United Nations, except that in relation to any state with a shorter period between notice and modification or termination, that shorter period shall apply as well to the United States.

ANTHONY D'AMATO

### UNNECESSARY UN-BASHING SHOULD STOP

No doubt in part because the United Nations is widely perceived in the United States to have been harassing the U.S., the United States is now being beastly to the United Nations. We are doing so in a manner, and to a degree not previously encountered except during the darkest days of the McCarthy period. This is in the interest neither of the United States nor of the United Nations, and should stop.

First there was the "Kassebaum amendment" which, in pursuit of the impossible dream of forcing weighted voting on fiscal matters based on budgetary contribution, has mandated deep, progressive cuts in the amount the United States is asked to pay the United Nations. This despite the fact that the basis for making the allocation is a capacity-to-pay formula that, while not beyond criticism, was designed primarily at Washington's behest.

Next there was the Gramm-Rudman formula, which also calls for deep, across-the-board, progressively implemented cuts over several years.

Then there is section 151 of the 1986-1987 Foreign Relations Authorization Act, which requires the United States to withhold a portion of its contribution equivalent to the amount of salaries Soviet and other Secretariat personnel are compelled by their governments to "kick back" to those governments. This is an old, deplorable practice and the Secretary-General has been insufficiently strenuous in efforts to put a stop to it. The section 151 approach, however, is a heavy-handed, mean-spirited way to get his attention.

Finally, there was last December's ukase to the UN requiring specific U.S. authorization for travel outside New York by several Communist-country and other nationals who are UN staff members and mandating that their travel arrangements not only be notified to, but booked by, the U.S. Government.<sup>1</sup>

Across-the-board unilateral cuts in the U.S. contribution to the United Nations are a violation of Article 17 of the UN Charter and, thus, of a cardinal U.S. treaty commitment. They are not even justified by the "Goldberg corollary," which merely holds that, since the United Nations has not punished the USSR for selectively withholding parts of its contribution in response to Soviet allegations that specific UN peacekeeping ac-

<sup>1</sup> Note verbale from the United States Mission addressed to the Secretary-General, Dec. 13, 1985, UN Doc. ST/IC/85/74, Ann. I (1986). For earlier correspondence on the subject, see Note verbale addressed to the Secretary-General by the Acting Permanent Representative of the United States, Aug. 29, 1985, *reprinted infra* at p. 438; and the Secretary-General's reply of Sept. 9, 1985, *reprinted infra* at p. 440.

tivities were *ultra vires*, we are entitled to a comparable privilege. Neither Kassebaum nor Gramm-Rudman is a surgical excision made in pursuit of a plausible theory of *ultra vires*. Aside from being illegal, these across-the-board cuts are self-defeating. America's leverage at the United Nations depends mightily on the size of our budgetary contribution. These cuts, by reducing our ability to withhold for clearly targeted purposes—the UN activities in support of the PLO are an example—constitute something akin to the fiscal equivalent of unilateral disarmament.

As for the travel restrictions, one cannot quarrel with the legality of controls on private travel of UN civil servants. The Charter-prescribed impartiality of that civil service is seriously undermined, however, when the United States seeks to control the official travel of senior Secretariat personnel and makes it significantly more difficult, say, to send a Bulgarian to a development-planning seminar in San Francisco than a French citizen. The Secretary-General, rightly, has responded by making the controls applicable equally to all staff; and Washington, mercifully, seems to have backed off from becoming the official travel agent for some four thousand UN employees.

Nevertheless, the embittering conflict over this issue need never have arisen. For obvious reasons, the legitimate security interest of the United States is focused on the unofficial travel of UN employees, some of whom are suspected of doing more than admiring the Grand Canyon. Requiring notification of such unofficial travel by all employees would not have assaulted the principle of an independent Secretariat or have antagonized a Secretary-General whose sympathetic attitude towards the United States is now a rapidly wasting asset.

THOMAS M. FRANCK

JUDGE PHILIP C. JESSUP (1897–1986)

As this issue went to press, the editors learned with great sadness of the death of Judge Philip Jessup, one of our most illustrious colleagues and a beloved friend. The July issue will contain a special section in tribute to the work and memory of Judge Jessup.

# CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

MARIAN NASH LEICH\*

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

## EXTRADITION

(U.S. *Digest*, Ch. 3, §5)

### *United States-United Kingdom Supplementary Treaty*

The Legal Adviser of the Department of State, Abraham D. Sofaer, testified on August 1, 1985 before the Senate Committee on Foreign Relations in support of the Supplementary Extradition Treaty between the United States and the United Kingdom of Great Britain and Northern Ireland, signed at Washington on June 25, 1985.<sup>1</sup> President Reagan had transmitted the Supplementary Treaty on July 17, 1985 to the Senate for advice and consent to ratification.

The principal purpose of the Supplementary Treaty was to eliminate the applicability of the "political offense exception" under the 1972 Extradition Treaty between the two countries to requests for extradition for specified crimes of violence, typically committed by terrorists; e.g., murder, manslaughter, kidnapping, air piracy, hostage taking and certain offenses relating to explosives, firearms or ammunition.

In his appearance before the Committee on Foreign Relations, the Legal Adviser pointed out that successful claims before magistrates and courts to immunity from extradition under the political offense exception, advanced by perpetrators of common crimes of violence, were making the United States a sanctuary for terrorists. Attempts to amend the federal extradition statute had been unsuccessful. The administration was seeking, therefore, to remedy the "overbroad" application of the political offense exception by courts and magistrates through the negotiation of amendments to U.S. extradition treaties. The rationale for amending the treaties was simple, the Legal Adviser said: "with respect to violent crimes, the political offense exception has no place in extradition treaties between stable democracies in which the political system is available to redress legitimate grievances and the judicial process provides fair treatment." The Supplementary Extradition Treaty with the United Kingdom was the first result of a number of negotiations in train.

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<sup>1</sup> S. TREATY DOC. NO. 8, 99th Cong., 1st Sess. (1985); see also 79 AJIL 1045 (1985).

Portions of Legal Adviser Sofaer's prepared statement follow:

*Origin and Evolution of the Political Offense Exception*

The overbroad application of any concept, however enlightened, can lead to foolish and antisocial results. You will understand how the political offense exception has come to produce such results by examining its evolution and true purposes.

First, the political offense exception is, above all, an *exception*. The basic tradition of international law applicable with respect to fugitives from justice is one of cooperation between nations to enhance their capacity to maintain the lawful order and security on which all liberty ultimately depends. . . .

From its inception, the political offense exception has been applied without significant controversy to "pure" political offenses . . . those directly related to the security and structure of the state: sedition, treason, and the like. Governments and courts have had little trouble excepting these offenses from extradition. By contrast, application of the exception to "relative" political offenses has always been problematical. Relative political offenses are common, often violent crimes—such as murder and arson—whose perpetrators, nevertheless, claim immunity from extradition because their common criminal acts were allegedly committed in a political context or for a political purpose.

Claims of immunity from extradition based on "relative" political offenses have posed difficulties for civilized nations from the start. For example, in 1855, a Belgian court invoked the political offense exception to deny a French request for extradition of a fugitive who had placed a bomb under the railway over which Emperor Napoleon III was traveling. This decision led the Belgian legislature—the land in which the exception originated—to amend the 1833 extradition law to refuse to recognize as political offenses certain common crimes used by terrorists for political ends. . . .

Courts have continued to grapple with the political offense exception through the years. For example, in 1891, Britain's Queen's Bench divisional court considered a Swiss extradition request for one Castioni, a fugitive who had shot and killed a State Council member in the course of an armed attack upon a municipal building. In a landmark decision, the justices held that a criminal act was not protected under the political offense exception if committed merely "in the course of" a political conflict or uprising; it must also be done "in furtherance of" a political cause. The court found that Castioni had acted as a participant in an insurrection, that the shooting had occurred during this conflict, and that the shooting had, in fact, not been an act of personal malice against the victim. The justices therefore ruled that the offense was political and denied extradition. American courts that have recently refused extradition have relied heavily on the ruling in *Castioni* [[1891] 1 Q.B. 149].

Three years after *Castioni*, however, the British courts refined the doctrine. The French Government requested extradition of one Meunier, who had carried out bomb attacks on a crowded cafe and an army barracks. Meunier fought extradition by invoking the political

offense exception. Justice Cave held that, for an offense to be judged political, "there must be two or more parties in the State, each seeking to impose the Government of their choice on the other." Meunier, the court found, was an anarchist who was the enemy of all organized society. Accordingly, he was not subject to the exception and was ordered extradited.

While *Castioni*, narrowly construed, may have made sense when it was decided, it makes no sense today to deny extradition to a nation such as Switzerland—with a democratic system of politics and a fair system of justice—of a man who willfully attempts to impose his will on the people through murder. If civilized society is to defend itself against terrorist violence, some offenses must fall outside the scope of the exception, even though they are politically motivated. The *Meunier* decision [[1894] 2 Q.B. 415] represents an early recognition that legal principles such as the political offense exception are based on the determination of sovereign nations to refuse, for humane or ideological reasons, to cooperate with other nations in the enforcement of criminal statutes. These principles do not create "rights" in the individuals that assert them. Each nation must decide how far to extend the doctrine based on its own values, and many have refused to shield from justice individuals who would destroy the freedoms and lives of others to gain political advantage.

#### *Abuse of the Political Offense Exception*

A few examples should illustrate how harmful and unacceptable decisions of other nations can be when they refuse to extradite Americans because of the political offense exception. In 1972, two American citizens, Holder and Kerkow, hijacked a domestic U.S. flight, extorted \$500,000 from the airline that owned the plane, and forced the pilot to fly to Algeria. They were indicted in the United States for aircraft piracy, kidnaping, and extortion. The U.S. Government requested that France extradite Holder and Kerkow to this country to stand trial. Although the crimes were extraditable offenses under the U.S.-France Extradition Treaty, a French court denied extradition in 1975. The court noted that, at one point in the skyjacking, Holder had demanded that the plane be flown to Hanoi. He later dropped that demand. Nevertheless, the court held that Holder's invocation of Hanoi demonstrated that he had acted out of political motive, bringing the crimes within the scope of the political offense exception.

Another egregious example of overbroad application of the exception resulted from the hijacking in 1973 by five U.S. citizens of a domestic flight. They demanded and received \$1 million in ransom for release of the passengers and then forced the plane to fly to Algeria. Two of the fugitives had escaped from prison, where they had been serving sentences for murder and armed robbery. The U.S. Government sought extradition of the five from Paris in 1976 to stand trial for air piracy. But a French court refused to extradite the fugitives. It accepted their claims that they had hijacked the plane to escape racial segregation in the United States and that the charges against them constituted political persecution. The court therefore held that the skyjacking and extortion were political offenses.

The Legal Adviser then discussed two of the four denials by United States judges or magistrates since 1979 of requests from the United Kingdom for extradition of Provisional Irish Republican Army (PIRA) fugitives: the cases of Desmond Mackin<sup>2</sup> and of Joseph Patrick Thomas Doherty.<sup>3</sup> While all four denials had been predicated upon the political offense exception to extradition, the violence in Northern Ireland, the Legal Adviser pointed out, did not result from lack of opportunity to engage in the democratic election process. Extremists in the (Irish) Republican movement in Northern Ireland, he said, apparently either rejected the democratic system or were not confident of success at the polls. "They have political rights, but they choose to act unlawfully."

The Legal Adviser continued his presentation before the Committee on Foreign Relations with a summary of the salient features of the special non-jury courts developed by the United Kingdom to try certain well-defined terrorist acts—the Diplock Courts:

The absence of a jury does not mean the central principles of procedural fairness are not maintained: trials are held in open court; witnesses may be called and cross-examined; the burden remains on the prosecution to prove guilt beyond a reasonable doubt; the accused has a right to legal advice and representation; and the right of appeal is completely unfettered. The judge in the *Doherty* case recognized these facts. He found:

The Court . . . specifically rejects respondent's claim that the Diplock Courts and the procedures there employed are unfair, and that respondent did not get a fair trial and could not get a fair trial in the courts of Northern Ireland. The Court concludes that both Unionists and Republicans who commit offenses of a political character can and do receive fair and impartial justice and that the courts of Northern Ireland will continue to scrupulously and courageously discharge their responsibilities in that regard [599 F.Supp. 270, 276 (1984)].

The Republic of Ireland, Legal Adviser Sofaer pointed out, also used nonjury courts for terrorist-type offenses.

In conclusion, he directed the committee's attention to the 1977 Council of Europe Convention for the Suppression of Terrorism,<sup>4</sup> which had established limits on the political offense exception that were "virtually identical" with those of the Supplementary Extradition Treaty with the United Kingdom.<sup>5</sup>

<sup>2</sup> See *United States v. Mackin*, 668 F.2d 122 (2d Cir. 1981).

<sup>3</sup> See *In re Doherty* by Gov't of United Kingdom, 599 F.Supp. 270 (S.D.N.Y. 1984), and *United States v. Doherty*, 615 F.Supp. 755 (S.D.N.Y. 1985).

<sup>4</sup> Done Jan. 27, 1977, ETS No. 90, reprinted in 15 ILM 1272 (1976). For a comparison of the U.S.-UK Supplementary Extradition Treaty and the European Convention, prepared in the Office of the Legal Adviser for submission to the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, see Dept. of State File No. P86 0010-1678.

<sup>5</sup> DEPT. ST. BULL., No. 2105, Dec. 1985, at 58-62; DEPT. OF STATE, CURRENT POLICY NO. 762, THE POLITICAL OFFENSE EXCEPTION AND TERRORISM (1985) (Statement prepared by Legal Adviser Abraham D. Sofaer).

## PRIVATE INTERNATIONAL LAW

(U.S. *Digest*, Ch. 15, §2)*Hague Convention on the Civil Aspects of International Child Abduction*

On October 30, 1985, President Ronald Reagan transmitted to the Senate the Hague Convention on the Civil Aspects of International Child Abduction, which 29 member states of the Hague Conference on Private International Law had adopted on October 24, 1980, at the 14th session of the Conference. Opened for signature the following day, October 25, 1980, the Convention was signed by the United States on December 23, 1981. It is currently in force for France, Portugal, Switzerland and parts of Canada.

The President recommended that the Senate give early and favorable consideration to the Convention and accord advice and consent to its ratification, subject to two reservations (both of an administrative nature and specifically permitted by the Convention) that were set out in an accompanying report by Secretary of State George P. Shultz, dated October 4, 1985.

Secretary Shultz explained details of the Convention in his report to the President, reading in part:

The Convention establishes a system of administrative and legal procedures to bring about the prompt return of children who are wrongfully removed to or retained in a Contracting State. A removal or retention is wrongful within the meaning of the Convention if it violates custody rights that are defined in an agreement or court order, or that arise by operation of law, provided these rights are actually exercised (Article 3), i.e., custody has not in effect been abandoned. The Convention applies to abductions that occur both before and after issuance of custody decrees, as well as abductions by a joint custodian (Article 3). Thus, a custody decree is not a prerequisite to invoking the Convention with a view to securing the child's return. By promptly restoring the *status quo ante*, subject to express requirements and exceptions, the Convention seeks to deny the abductor legal advantage in the country to which the child has been taken, as the courts of that country are under a treaty obligation to return the child without conducting legal proceedings on the merits of the underlying conflicting custody claims.

Each country must establish at least one national Central Authority primarily to process incoming and outgoing requests for assistance in securing the return of a child or the exercise of visitation rights (Article 6). In the United States the Central Authority is to be located in an existing agency of the federal government which will, however, need to rely on state and local facilities, including the Federal Parent Locator Service and the private bar, in carrying out the measures listed in Article 7 of the Convention. These measures include best efforts to locate abducted or retained children, explore possibilities for their voluntary return, facilitate provision of legal services in connection with judicial proceedings, and coordinate arrangements for the child's return travel (Article 7).

Articles 11-17 are the major provisions governing legal proceedings for the return of an abducted child. Under the Convention, if a proceeding is brought less than a year from the date of the removal or

retention and the court finds that the conduct was wrongful, the court is under a treaty obligation to order the child returned. When proceedings are brought a year or more after the date of the removal or retention, the court is still obligated to order the child returned unless the person resisting return demonstrates that the child is settled in the new environment (Article 12).

Although the Convention ceases to apply as soon as a child reaches sixteen years of age (Article 4), it does not limit the power of appropriate authorities to order the return of an abducted or wrongfully retained child at any time pursuant to other laws or procedures that may make return in the absence of a treaty obligation possible (Article 18).

Articles 13 and 20 enumerate those exceptional circumstances under which the court is not obligated by the Convention to order the child returned. The person opposing return of the child bears the burden of proving that: (1) custody rights were not actually being exercised at the time of the removal or retention by the person seeking return or the person seeking return had consented to or subsequently acquiesced in the removal or retention; or (2) there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. A court also has discretion to refuse to order a child returned if it finds that the child objects to being returned and has reached an age or degree of maturity making it appropriate to consider his or her views (Article 13). A court may also deny a request to return a child if the return would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Article 20). Unless one of the enumerated exceptions to the return obligation is deemed to apply, courts in Contracting States will be under a treaty obligation to order a child returned.

Visitation rights are also protected by the Convention, but to a lesser extent than custody rights (Article 21). The remedies for breach of the "access rights" of the non-custodial parent do not include the return remedy provided by Article 12. However, the non-custodial parent may apply to the Central Authority under Article 21 for "organizing or securing the effective exercise of rights of access." The Central Authority is to promote the peaceful enjoyment of these rights. The Convention is supportive of the exercise of visitation rights, i.e., visits of children with non-custodial parents, by providing for the prompt return of children if the non-custodial parent should seek to retain them beyond the end of the visitation period. In this way the Convention seeks to address the major concern of a custodial parent about permitting a child to visit the non-custodial parent abroad.<sup>1</sup>

In a memorandum to Acting Secretary of State William Clark, dated December 9, 1981, recommending U.S. signature of the Convention, Davis R. Robinson, then the Legal Adviser of the Department of State, had enclosed a Memorandum of Law prepared by Peter H. Pfund, Assistant Legal Adviser for Private International Law, which read in part:

<sup>1</sup> S. TREATY DOC. NO. 11, 99th Cong., 1st Sess. (3)-(5) (1985).



This is an appropriate exercise of the treaty power. Federal legislation was recently enacted with respect to interstate child abductions, requiring that full faith and credit be given by every State to child custody determinations of other States that meet requirements reflecting those of the Uniform Child Custody Jurisdiction Act (UCCJA). This legislation, entitled the Parental Kidnaping Prevention Act of 1980 (P.L. 96-611), authorizes use of the Federal Parent Locator Service in connection with the enforcement or determination of child custody and in cases of parental kidnaping, also with respect to federal assistance in kidnaping under the Fugitive Felon Act (18 U.S.C. 1073). Eventual ratification and implementation of the Hague Convention would extend federal government involvement in this area of family law to cases of international child abduction.<sup>2</sup>

#### CLAIMS SETTLEMENT AGREEMENTS

(U.S. Digest, Ch. 9, §3)

##### *United States-Provisional Military Government of Socialist Ethiopia*

On December 19, 1985, the Acting United States Chargé d'Affaires at Addis Ababa, Joseph F. O'Neill, and the Commissioner of the Compensation Commission of the Provisional Military Government of Socialist Ethiopia, Getahun Terrefe, signed on behalf of their respective Governments a compensation agreement for settlement of claims of U.S. nationals relating to property, rights and interests in Ethiopia affected by measures of nationalization, expropriation and other restrictive measures ordered or decreed by the Ethiopian Government. The agreement includes claims based upon an indirect ownership interest in the assets of a corporation or other legal entity, itself not a United States national, for loss by reason of such measures, if at the time the loss occurred, U.S. nationals either (a) owned directly or indirectly 25 percent or more of the outstanding stock or other beneficial interest in such legal entity, or (b) controlled such legal entity.

The agreement provides for payment of \$7 million as compensation, an initial payment of \$1.5 million to be paid within 30 days of the agreement's entry into force (the date of signature). The balance of \$5.5 million is to be paid in 10 equal semiannual installments, the first payable on July 19, 1986, and the second on January 19, 1987; subsequent installments will be payable on the same dates in each succeeding year.

Under the agreement, the United States Government will distribute the compensation amounts in accordance with such methods of distribution as it may choose to adopt, without any responsibility arising therefrom for the Ethiopian Government. Upon completion of the required payments, the Ethiopian Government will be fully discharged from its obligations and liabilities to U.S. nationals for claims covered by the agreement, whether or not they have been brought to the attention of the Ethiopian Government.

<sup>2</sup> Dept. of State Staff Secretariat Doc. No. 8135635.

The agreement also settles and discharges all claims of the Ethiopian Government and its political subdivisions, agencies, instrumentalities or controlled entities against U.S. nationals with regard to measures of nationalization, expropriation and other restrictive measures ordered or decreed by the Ethiopian Government, including but not being limited to all counterclaims arising from the same transactions or occurrences giving rise to the claims of U.S. nationals covered by the agreement.

The agreement provides that the United States will not espouse or present to the Ethiopian Government any claims of U.S. nationals covered thereby, and that the Ethiopian Government is subrogated to all the legal rights and interests in properties involved in such claims in the place and stead of the claimants.

Two agreed minutes form part of the overall agreement between the parties. The first excludes therefrom official claims between the two Governments. The second relates to the claims and counterclaims asserted by the Ethiopian Spice Extraction Share Company, the Kalamazoo Spice Extraction Company (and its related and affiliated companies) and the Provisional Military Government of Socialist Ethiopia in two cases in the United States District Court for the Western District of Michigan: *Ethiopian Spice Extraction Share Co. v. Kalamazoo Spice Extraction Co., Kalsec, Inc., and Kalsec International, Inc.* (No. K79-400 CA), and *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia* (No. K81-17 CA). The agreed minute stated in part:

The two Governments . . . intend that both of those litigations should be terminated with prejudice to the claims of all parties concerned, and without payment by any party to any other party, contemporaneously with the entry into force of the Compensation Agreement. To that end, both Governments expect that the attorneys representing the parties to those litigations will promptly submit a joint stipulation to the court for the dismissal of the complaints and counterclaims in both actions, including the transfer to the Ethiopian Government of Kalamazoo Spice Extraction Company's remaining equity interest in the Ethiopian Spice Extraction Share Company and the waiver of all rights and claims, direct or indirect thereto. The United States Government confirms that the Kalamazoo Spice Extraction Company (and its related and affiliated companies) has consented to the disposition of the cases on this basis.<sup>1</sup>

<sup>1</sup> Dept. of State Files L/T. For discussion of the litigation, see 77 AJIL 144 (1983) and 78 AJIL 902 (1984). See also *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 616 F.Supp. 660 (W.D. Mich. 1985).

Because of Ethiopian failure to take meaningful steps to provide compensation to Americans whose properties had been expropriated, the United States suspended foreign assistance in 1979, pursuant to the Hickenlooper Amendment. The United States had also begun voting in various multilateral development banks against proposed loans to Ethiopia and had denied generalized tariff preferences to Ethiopia. Brief for the United States as *Amicus Curiae*, *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, No. 82-1521, at 5 (6th Cir. 1984); also at Dept. of State File No. P84 0151-0761.

## JUDICIAL DECISIONS

MONROE LEIGH

*Criminal law—Nuremberg defense—destruction of government property—justification under international law as affirmative defense to criminal conviction*

UNITED STATES v. MONTGOMERY. 772 F.2d 733.

U.S. Court of Appeals, 11th Cir., September 27, 1985.

Defendants, eight members of an antinuclear group called "Pershing Plowshares," were convicted of conspiracy and depredation of U.S. Army property after they entered a government defense contractor's plant and hammered and poured blood on nuclear missile launchers located there. Each defendant was sentenced to 3 years' imprisonment and 5 years' probation, and was ordered to pay \$2,908 in restitution. Defendants appealed their convictions, alleging certain irregularities in jury selection and objecting to the trial court's rejection of their proffered affirmative defenses that their violation of domestic law was justified by necessity and international law. The United States Court of Appeals for the Eleventh Circuit (per Roney, J.) affirmed the conviction and *held*: that the trial court properly conducted jury selection and precluded evidence on the necessity and international law defenses.

After disposing of defendants' claims that certain jurors were biased, the court of appeals turned to what it described as the "[d]efendants' most interesting claim"<sup>1</sup>—their argument that their violations of U.S. law were justified by international law. Defendants claimed that U.S. nuclear weapons policy violated international law, and that all peaceful means of changing U.S. nuclear policy were futile or ineffectual. Out of necessity, defendants were therefore forced to resort to the physical destruction of nuclear missile components. Moreover, defendants argued that this attack on the missile components was justified in order to insulate themselves from personal liability for the U.S. Government's violation of international law. Defendants based their defense on certain post-World War II *Nuremberg Trial* cases which found that individuals, under circumstances of necessity, may have a duty under international law to violate domestic law.

The court first rejected defendants' defense based on necessity, since, according to the court, in order to change U.S. nuclear policy, the "defendants had reasonable legal alternatives to the destruction of Government property, including peaceful protests and petitioning Congress or the President."<sup>2</sup> Moreover, even assuming U.S. arms policy violated international law, defendants' violent actions would not have remedied that violation since there was no "reasonable belief that a direct consequence of their actions would be nuclear disarmament."<sup>3</sup>

<sup>1</sup> 772 F.2d 733, 736.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

The court then considered whether the domestic law with which defendants were charged required them to violate a principle of international law. The court acknowledged that, according to the *Nuremberg Trials*, "[i]nternational law, as such, binds every citizen" <sup>4</sup> and agreed that in the proper case international law could justify a violation of inconsistent domestic law. According to the court, however, defendants' situation was distinguishable from the *Nuremberg* cases. The Nuremberg Tribunal held that German citizens had been *required* by domestic law to violate international law; therefore, they had a duty to disobey the domestic law.<sup>5</sup> In this case, the court found, defendants were not required by domestic law "to do anything that could even arguably be criminal under international law,"<sup>6</sup> and were thus outside the Nuremberg principle.

Moreover, the court referred to *The Flick Case*, another of the *Nuremberg Trials*, where, on the theory of necessity, the Tribunal acquitted factory managers who employed slave labor since they had no control over the slave labor program. In this case, even if U.S. nuclear policy was found to be in violation of international law, the court held that defendants could not be considered liable for that violation under international law because they were not in control of U.S. policy. Thus, the defense predicated on justification under international law was inapplicable.

The court's reference to *The Flick Case* suggests that a defendant must be in control of a policy before obedience to that policy can create liability under international law. However, it should be noted that *The Justice Case* found that certain judges had violated international law by enforcing policies over which they had no control.<sup>7</sup>

Nonetheless, the court correctly decided that a defendant cannot avail himself of the defense of justification under international law when the U.S. Government did not actively compel him to adopt or implement a policy that allegedly violates international law. A more definitive involvement by the defendant in the offending policy appears to be a pragmatic requirement for operation of the defense. Otherwise, courts could be placed in the untenable position of having to exonerate an individual who commits crimes merely because that individual objects to a government policy that arguably violates an established treaty or principle of customary international law.

*Counterclaims against Iran—effect of Algiers Accords on U.S. domestic law—non-self-executing executive agreements*

ISLAMIC REPUBLIC OF IRAN v. BOEING CO. 771 F.2d 1279.  
U.S. Court of Appeals, 9th Cir., September 17, 1985.

Appellant, the Islamic Republic of Iran, sued appellees, the Boeing Co. and Logistics Supports Corp. (LSC), for damages resulting from the crash

<sup>4</sup> *Id.* at 737 (quoting *The Flick Case*, 6 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, at 1192 (1952)).

<sup>5</sup> *Id.* at 737 (citing *The Justice Case*, 3 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, at 1086 (1951)).

<sup>6</sup> 772 F.2d at 738.

<sup>7</sup> See *The Justice Case*, *supra* note 5.

of a Boeing 747 aircraft owned by Iran and serviced by LSC. Appellees filed counterclaims to which Iran did not respond, and the district court entered a final judgment against Iran. On appeal, Iran argued that the executive agreement that settled the hostage crisis with Iran, known as the Algiers Accords,<sup>1</sup> deprived the district court of jurisdiction over the counterclaims. The U.S. Court of Appeals for the Ninth Circuit (per Wallace, J.) affirmed the judgment against Iran and *held*: that the Algiers Accords are not self-executing and that, in any event, both the Accords and the executive order<sup>2</sup> implementing them allow the assertion of permissive counterclaims against Iran in U.S. courts.

Appellant first argued that the Accords divested the district court of jurisdiction to interpret the Accords. To support this assertion, appellant relied on a provision of one component of the Accords, known as the Claims Settlement Agreement, which provides that "[a]ny question concerning the interpretation or application of this agreement shall be decided by the [Iran-United States Claims] Tribunal upon the request of either Iran or the United States."<sup>3</sup> Appellees argued that the court was not bound by this provision because the Accords are not self-executing.

The court first observed that if the Accords are not self-executing, they have "no effect on domestic law absent additional governmental action."<sup>4</sup> As to whether a treaty, and by analogy an executive agreement, is self-executing, the court cited four relevant factors from a previous Ninth Circuit decision: "(1) 'the purposes of the treaty and the objectives of its creators,' (2) 'the existence of domestic procedures and institutions appropriate for direct implementation,' (3) 'the availability and feasibility of alternative enforcement methods,' and (4) 'the immediate and long-range social consequences of self- or non-self-execution.'"<sup>5</sup> The court observed that the first factor is "critical to determine *whether* an executive agreement is self-executing, while the other factors are most relevant to determine *the extent* to which the agreement is self-executing."<sup>6</sup> Applying this test, the court concluded that the language of the Accords and the intent of the United States, as evidenced by various presidential statements, indicated that the Accords are not self-executing, either in whole or in part. Thus, the Accords could not divest a U.S. court of jurisdiction to interpret the Accords.

<sup>1</sup> For background on the Algiers Accords and the Iran-United States Claims Tribunal, see 77 AJIL 642 (1983).

<sup>2</sup> Exec. Order No. 12,294, 3 C.F.R. 139 (1982), *reprinted in* 50 U.S.C.A. §1701 note (West Supp. 1985).

<sup>3</sup> Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, U.S.-Iran, Art. VI, para. 4, *reprinted in* 75 AJIL 422, 424 (1981) [hereinafter cited as Claims Settlement Agreement].

<sup>4</sup> 771 F.2d 1279, 1283.

<sup>5</sup> *Id.* (quoting *People of Saipan v. United States Dep't of Interior*, 502 F.2d 90, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975)).

<sup>6</sup> 771 F.2d at 1283 (emphasis in original).

The court next considered whether the executive order and the Accords allow the assertion of permissive counterclaims against Iran in a suit it commenced prior to the hostage crisis. Appellant acknowledged that the executive order allows counterclaims to be pursued in U.S. courts, but contended that in this respect the executive order is inconsistent with a provision of the Accords which states that "the United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran."<sup>7</sup> In rejecting this argument, the court pointed out that the Claims Settlement Agreement expressly distinguishes between "claims" and "counterclaims." Moreover, the Claims Settlement Agreement grants jurisdiction to the Iran-United States Claims Tribunal only over "*claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim.*"<sup>8</sup> On the basis of this provision, the court found that the Claims Settlement Agreement vests the Tribunal with jurisdiction only over those counterclaims brought by a *party* to the Agreement and "does not contemplate the assertion of the Tribunal's jurisdiction over the counterclaims of nationals against the parties."<sup>9</sup> Accordingly, the court concluded that the executive order is consistent with the Accords.

Appellant also contended that the Accords, the executive order and related U.S. regulations permit the assertion of only compulsory counterclaims. In this respect, the court observed that the Claims Settlement Agreement allows parties to bring "compulsory counterclaims" against plaintiff-nationals before the Tribunal and that the executive order and the regulations do not distinguish between compulsory and permissive counterclaims. Admitting that "more than one interpretation of the Executive Order and regulations is reasonable on this issue," the court nevertheless concluded that "the most reasonable interpretation of these authorities is that neither the United States nor Iran intended to limit counterclaims when a party commences an action in the courts of the other party."<sup>10</sup> The court further observed that this interpretation is not inconsistent with the Accords because "the Accords have no effect on actions brought by a party in the courts of the other party."<sup>11</sup>

The court's exclusive reliance on the intent of the United States to determine whether an executive agreement is self-executing is a theoretical change in the applicable standard of the Ninth Circuit. However, this revised test is consistent with the provisions of section 131, comment *h*, of the *Restatement of the Foreign Relations Law of the United States (Revised)*.<sup>12</sup>

<sup>7</sup> Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, U.S.-Iran, para. B, reprinted in 75 AJIL 418, 418 (1981).

<sup>8</sup> 771 F.2d at 1285 (quoting Claims Settlement Agreement, *supra* note 3, Art. II (emphasis by court)).

<sup>9</sup> 771 F.2d at 1285.

<sup>11</sup> *Id.*

<sup>10</sup> *Id.* at 1286.

<sup>12</sup> Tent. Draft No. 6, 1985.

*Alien Tort Claims Act—discretionary relief—political question doctrine—domestic sovereign immunity—private right of action—U.S. support of Nicaraguan rebels*

SANCHEZ-ESPINOZA v. REAGAN. 770 F.2d 202.

U.S. Court of Appeals, D.C. Cir., August 13, 1985.

Plaintiffs, including 12 citizens of Nicaragua and 12 members of the U.S. House of Representatives, brought suit against nine present and former U.S. executive officials, two organizations allegedly operating paramilitary training camps in the United States and the alleged leader of a revolutionary group bearing arms against the Government of Nicaragua (the "contra" forces). Asserting constitutional, statutory, tort and international law claims based on the defendants' alleged support of the contras, plaintiffs sought damages for injuries caused by the contras and injunctive relief against further U.S. assistance. The district court dismissed the suit, primarily on the ground that it presented a nonjusticiable political question.<sup>1</sup> The U.S. Court of Appeals for the District of Columbia Circuit (per Scalia, J.) affirmed and *held*: that some of plaintiffs' claims presented a nonjusticiable political question involving the conduct of U.S. foreign policy, while others should be dismissed on the basis of the court's power to withhold discretionary injunctive relief and the absence of a private right of action.

Plaintiffs' suit alleged that several present and former U.S. officials, including President Reagan, had conspired to finance, train and direct the contras in activities that "terrorize and otherwise injure the civilian population of" Nicaragua,<sup>2</sup> and that these officials had developed and implemented a plan to overthrow the Government of Nicaragua. Plaintiffs claimed that as part of this plan, U.S. officials had provided assistance to paramilitary groups operating training camps for the contras in the United States, Nicaragua and other Central American countries. Plaintiffs asserted that with this assistance, the contras were able to carry out attacks on Nicaraguan civilians and on public and private property in Nicaragua. The Nicaraguan plaintiffs contended that these acts (1) caused tortious injury actionable under the Alien Tort Claims Act (28 U.S.C. §1350 (1982)), (2) violated their rights under the Fourth and Fifth Amendments to the U.S. Constitution, and (3) violated four U.S. statutes relating to the conduct of U.S. foreign policy.<sup>3</sup> The 12 congressional plaintiffs asserted that the U.S. officials had violated the Boland amendment,<sup>4</sup> a law forbidding the CIA and the Department of Defense from providing assistance to any group for the purpose of overthrowing the Nicaraguan Government. They also alleged that providing assistance to the contras was tantamount to waging war, thereby depriving

<sup>1</sup> 568 F.Supp. 596 (D.D.C. 1983).

<sup>2</sup> 770 F.2d 202, 205 (quoting Amended Complaint, para. 31).

<sup>3</sup> The War Powers Resolution, 50 U.S.C. §§1541-1548 (1982) and 50 U.S.C.A. §1546a (West Supp. 1985); the Hughes-Ryan Amendment, 50 U.S.C. §413 (1982); the National Security Act of 1947, *codified as amended* in scattered sections of Titles 5 and 50 U.S.C. (1982); and the Neutrality Act, 18 U.S.C. §960 (1982).

<sup>4</sup> Pub. L. No. 97-377, §793, 96 Stat. 1865 (1982).

them of their constitutional right under the war powers clause<sup>5</sup> to participate in a declaration of war.

Reviewing the Nicaraguan plaintiffs' claim for money damages under the Alien Tort Claims Act, the court of appeals first observed that the statute arguably covers only private, nongovernmental acts that violate either a treaty or customary international law. The plaintiffs, however, could cite no treaty under which defendants' alleged conduct was unlawful, at least to the extent that defendants were acting in their private capacities. Relying on *Tel-Oren v. Libyan Arab Republic*,<sup>6</sup> the court held that customary international law also does not reach private conduct "of this sort."<sup>7</sup> Thus, plaintiffs' claim for damages could only be sustained to the extent that defendants acted in an official capacity. Even if the Alien Tort Claims Act applied to official state acts, however, the doctrine of domestic sovereign immunity precluded plaintiffs' monetary claim. According to the court, while the claim was nominally against individual officials, it in fact challenged actions of the U.S. Government that by jurisdictional necessity had to be regarded as official acts. As to these, the court could find no waiver of sovereign immunity, observing that the Alien Tort Claims Act itself is not such a waiver.

With respect to plaintiffs' claim for declaratory and injunctive relief, the court found that the defense of sovereign immunity was arguably waived by a provision of the Administrative Procedure Act (5 U.S.C. §702 (1982)). The court observed, however, that all forms of nonmonetary relief are discretionary. The court held that even if the case were justiciable, it would be an abuse of its discretion to grant nonmonetary relief "where the authority for our interjection into so sensitive a foreign affairs matter as this are statutes no more specifically addressed to such concerns" than the Alien Tort Claims Act and the Administrative Procedure Act.<sup>8</sup>

The court also dismissed the Nicaraguan plaintiffs' Fourth and Fifth Amendment claims. Plaintiffs' claim for damages was rejected on the ground that monetary relief for alleged constitutional violations should not be fashioned by the courts when special considerations require that Congress provide such a remedy. Such considerations included the risk of embarrassing the U.S. Government through conflicting pronouncements on foreign affairs by different branches of government.<sup>9</sup> The court declined to reach the question whether the protections of the U.S. Constitution extend at all to non-U.S. citizens residing abroad. The court observed, however, that "as a general matter the danger of foreign citizens' using the courts . . . to obstruct the foreign policy of our government" requires the denial of monetary relief.<sup>10</sup> Injunctive relief was again denied as a matter of the court's discretion.

The Nicaraguan plaintiffs' statutory claims were dismissed on the ground

<sup>5</sup> U.S. CONST. art. 1, §8, cl. 11 (confers on Congress the power to declare war).

<sup>6</sup> 726 F.2d 774, 791-96 (D.C. Cir. 1984), summarized in 78 AJIL 668 (1984) (Edwards, J., concurring), cert. denied, 105 S.Ct. 1354 (1985); see also 726 F.2d at 813-15 (Bork, J., concurring).

<sup>7</sup> 770 F.2d at 207.

<sup>8</sup> *Id.* at 208.

<sup>9</sup> See *Baker v. Carr*, 369 U.S. 186, 217, 226 (1962).

<sup>10</sup> 770 F.2d at 209.



that none of the statutes at issue contained an explicit provision for a private cause of action, and no such cause of action could fairly be implied by a reading of congressional intent. Three of the statutes were intended to divide responsibility for military and foreign affairs between the executive and legislative branches, not to benefit a special class of individuals asserting a private right of action. Plaintiffs' claim under the fourth statute—the Neutrality Act,<sup>11</sup> which prohibits private military activities directed against a foreign state—was rejected on the grounds that private actions are seldom implied in criminal statutes, and that particular deference should be given to the executive branch's discretion in prosecuting cases affecting foreign affairs.

Finally, the court rejected the claims of the congressional plaintiffs, which were founded on alleged violations of the Boland amendment and the war powers clause. The Boland amendment, which prohibited U.S. military aid to Nicaraguan rebels, was an attachment to a 1983 appropriations bill; its expiry at the end of that fiscal year rendered the claim moot. As for the claim under the war powers clause, the court cited its decision in *Crockett v. Reagan*<sup>12</sup> dismissing on political question grounds a similar claim relating to alleged military activity in El Salvador.

This decision reflects the deference that U.S. courts customarily afford the executive branch in areas related to U.S. foreign policy. The claims by the Nicaraguan plaintiffs for nonmonetary relief—i.e., declaratory judgments and injunctions restraining U.S. officials from pursuing the alleged plan to assist the contras—were denied as a discretionary matter. Although it avoided reliance on the sweeping invocation of the political question doctrine adopted by the district court, the “discretionary” approach of the court of appeals may not provide as useful a precedent as application of the criteria for justiciability set forth by the Supreme Court in *Baker v. Carr*.<sup>13</sup>

*International fisheries regulation—statutory interpretation—justiciability—mandamus authority*

AMERICAN CETACEAN SOCIETY v. BALDRIGE. 768 F.2d 426.  
U.S. Court of Appeals, D.C. Cir., August 6, 1985.

Plaintiffs, various wildlife conservation groups, filed suit in federal district court to force defendants, Secretary of Commerce Baldrige and Secretary of State Shultz, to certify that Japanese whaling activities violated quotas set by the International Whaling Commission (IWC) and thereby diminished the effectiveness of that program. Such certifications would automatically result in a reduction of Japanese fishing quotas in U.S. waters. The district court granted summary judgment for plaintiffs, finding that under the Pelly Amendment to the Fishermen's Protective Act of 1967 (22 U.S.C. §1978

<sup>11</sup> See note 3 *supra*.

<sup>12</sup> 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 3533 (1984).

<sup>13</sup> 369 U.S. 186, 217 (1962).

(1982)) (the Pelly Amendment) and the Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act of 1976 (16 U.S.C. §1821 (1982)) (the Packwood-Magnuson Amendment), Secretary Baldrige was required to certify Japan for violating IWC quotas. The U.S. Court of Appeals for the District of Columbia Circuit (per Wright, J.) affirmed and *held*: that although in some situations the Secretary of Commerce has discretion whether to certify, the Secretary is *required* to certify a foreign country such as Japan whose nationals harvest whales in excess of IWC quotas. Judge Oberdorfer dissented.

In 1981 the IWC voted to provide a zero quota for the taking of North Pacific sperm whales. Japan, a member of the IWC, filed an objection to this quota, and under IWC procedures, was thereby not bound by the quota. Japan also obtained special IWC permission to continue whaling until the 1984-1985 season; however, when that permission expired, Japan continued to harvest whales in violation of the zero quota.

Recognizing that its whaling activities could result in the denial or limitation of fishing rights in U.S. waters, Japan entered into negotiations with the U.S. Secretaries of Commerce and State. On November 13, 1984, an executive agreement was reached, under which the United States agreed not to certify Japan and impose the resulting sanctions in exchange for Japan's agreement to cease all whaling in 1988. Plaintiffs immediately filed suit, claiming that this action violated the certification procedures established by the Pelly and Packwood-Magnuson Amendments. The district court agreed.

On appeal, the court began by examining the two statutes upon which the district court had relied. The Pelly Amendment was enacted in 1971 to assist in the enforcement of international fishery and wildlife conservation programs such as the IWC. Under the Pelly Amendment, the Secretary of Commerce must certify to the President any nation whose fishing operations "diminish the effectiveness" of any international fisheries conservation program to which the United States is a party. Upon receipt of this certification, the President may prohibit the importation of fish products from the offending country into the United States. In 1979 the Packwood-Magnuson Amendment was enacted to reinforce the Pelly Amendment. Under the Packwood-Magnuson Amendment, the Secretary of State is *required* to impose sanctions against any country whose fishing activities are certified by the Secretary of Commerce to "diminish the effectiveness" of the International Convention for the Regulation of Whaling,<sup>1</sup> the treaty establishing the IWC.

Since neither statute defined the phrase "diminish the effectiveness" of an international fishery conservation program, the court had to determine whether a nation's disregard of quotas would be considered by Congress *per se* to diminish the effectiveness of the program. According to the court, if that was Congress's intent, then the statutes created a mandatory, non-discretionary duty on the part of the Secretary of Commerce to certify the offending country, whether or not the country had filed an objection to the

<sup>1</sup> Dec. 2, 1946, TIAS No. 1849, 62 Stat. 1716 (1948).

quota or had entered into an alternative arrangement with the executive branch regarding its fishing activities.

After conducting an exhaustive examination of the legislative history of the Pelly Amendment, the court concluded that Congress had intended that the violation of quotas established by the IWC would automatically result in certification. Under such circumstances, the Secretary of Commerce had a mandatory, nondiscretionary duty to certify the nation whose fishing activities were at issue. Since it was clear that Japan was harvesting whales in violation of the zero quota set by the IWC, the lower court had appropriately issued a writ of mandamus ordering the Secretary of Commerce to certify Japan for the purposes of the Pelly and Packwood-Magnuson Amendments.<sup>2</sup>

Judge Oberdorfer dissented, arguing that the foreign relations aspects of the case required the court to give greater weight to the executive branch's interpretation of the statutes. Since the Secretary of Commerce had concluded that the statutes granted him discretion to decide when a foreign country's actions diminished the effectiveness of international fisheries conservation programs, the court should refrain from issuing a contrary opinion based upon secondary evidence of congressional intent.<sup>3</sup> Judge Oberdorfer suggested that while mandamus actions might be appropriate in situations where a statute regarding *domestic* affairs is somewhat ambiguous, in areas relating to international affairs, courts should refrain from enforcing ministerial duties where the congressional mandate is less than absolutely clear. Responding to this argument, the majority noted simply that "it is imperative to remember that the Legislative Branch, by explicit constitutional provision, has the power to regulate foreign commerce. . . . [S]ince the judiciary's role is to declare what the law is when Congress has acted, . . . we must perform that duty even in this delicate context."<sup>4</sup>

The decision in *American Cetacean Society* deviates from the tendency of courts to defer to the executive branch in disputes involving foreign affairs. This tendency is most apparent in the expanded use of the political question or justiciability doctrine, under which a court declines to rule on an issue involving foreign affairs in order to avoid divergent pronouncements by different branches of government. Clearly, there are limits to judicial deference and the decision in *American Cetacean Society* articulates one of those limits—namely, where Congress acts in an area reserved to it by the Constitution, the courts must interpret and enforce Congress's will, despite possible adverse foreign policy consequences.<sup>5</sup>

<sup>2</sup> Intervenor-appellants Japan Fisheries Association and Japan Whaling Association argued that the imposition of sanctions against a validly objecting member was a violation of international law. The court of appeals rejected this argument in a footnote, noting simply that "[t]here is no prohibition in the Convention against member nations acting unilaterally to force an objecting member . . . to comply with the Convention's regulations . . ." 768 F.2d 426, 429 n.l.

<sup>3</sup> The dissent also suggested that the case may not present a justiciable question, owing primarily to the possibility of interfering with the Executive's conduct of foreign affairs.

<sup>4</sup> 768 F.2d at 444 (citations omitted).

<sup>5</sup> The Supreme Court granted certiorari on Jan. 13, 1986 *sub nom.* Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S.Ct. 787 (1986).

*Breach of contract—authority of corporate director to bring suit—Iranian law—act of state doctrine—situs of debt*

TCHACOSH CO. v. ROCKWELL INTERNATIONAL CORP. 766 F.2d 1333.  
U.S. Court of Appeals, 9th Cir., July 23, 1985.

Tchacosh Co., an Iranian corporation, brought suit in federal district court to recover payment under a subcontract with defendant, Rockwell International Corp., for the construction of certain defense facilities at the Mehrabab Airport in Tehran. The U.S. District Court for the Central District of California granted summary judgment for Rockwell. The U.S. Court of Appeals for the Ninth Circuit (per Tang, J.) affirmed and *held*: that the former managing director of Tchacosh lacked authority to bring suit on behalf of the corporation since his authority had been removed by the Iranian Government's act of state.

In November 1978, Tchacosh entered into a subcontract with Rockwell for the construction of defense facilities in Iran. At that time, three entities were authorized under Iranian law to manage the affairs of Tchacosh: the general meeting of shareholders, the board of directors and the managing director. On June 14, 1979, the Iranian Government enacted the Temporary Director Act, authorizing the appointment of a "temporary director" to any Iranian company and thereby divesting the managing director of his authority. On August 18, 1979, pursuant to this law, the Iranian Government appointed a temporary director to Tchacosh. Subsequently, in 1981, the Iranian Government dissolved Tchacosh under the authority of the Iranian Management and Acquisition Act and appointed an official to initiate liquidation proceedings. Under Article 212 of the Iran Companies Law, appointment of a liquidator and the initiation of liquidation proceedings extinguished the powers of the company director.

In December 1979, the former managing director of Tchacosh, Mr. Hashemi, initiated this lawsuit in federal district court on behalf of Tchacosh against Rockwell. Tchacosh claimed that it had substantially performed its subcontract and that Rockwell had failed to pay for these services. The district court dismissed the suit on the basis that Iranian Government acts had divested Mr. Hashemi of authority to sue.<sup>1</sup>

On appeal, Tchacosh raised two principal arguments. First, Tchacosh claimed that the Iranian Government's actions were not intended to preclude Mr. Hashemi from initiating suit to recover for work performed while he managed the company. Second, Tchacosh argued that even if the Iranian Government had intended to divest the former director of his authority to bring suit, its actions should not be given effect since they violated U.S. public policy against uncompensated confiscations.

As for the first argument, the court of appeals noted that the Iranian laws

<sup>1</sup> This case was not preempted by the jurisdiction of the Iran-U.S. Claims Tribunal because the Tribunal's jurisdiction does not extend to claims brought in the first instance by Iranian nationals against U.S. nationals.

authorizing the appointment of temporary directors and liquidators were unequivocal. On their face, both laws divested former company directors of all authority to manage or act on behalf of the company. In this case, a temporary director had been appointed to Tchacosh in August 1979, approximately 4 months before suit was filed in U.S. court. Moreover, according to the court, a liquidator was empowered under Iranian law to institute lawsuits in furtherance of the liquidation. Since no such suit had been filed against Rockwell in this case, Tchacosh's former director lacked authority to initiate a lawsuit against Rockwell in U.S. court.

As for appellant's second argument, the court observed that under the act of state doctrine, a U.S. court will not examine the validity of a foreign sovereign act committed within the confines of its territory, even if the act conflicts with U.S. notions of justice. Tchacosh argued that the act of state doctrine was inapplicable since the Iranian Government's action, which would effectively extinguish a contract debt located in the United States, was an extraterritorial assertion of sovereign power. In addressing this argument, the court noted that the act of state doctrine "is to be applied pragmatically and flexibly";<sup>2</sup> the court then espoused a number of reasons why the extraterritorial exception did not apply in this case. The court first observed that "Iran was in a position to 'perform a *fait accompli*' over the acquisition of any money owed Tchacosh by Rockwell."<sup>3</sup>

Tchacosh was incorporated under the laws of Iran. The subcontract in issue was to be performed wholly within Iran. Iran retains any work completed. Payment was to be invoiced and made to Rockwell's office in Teheran. Disputes arising under the subcontract were to be resolved under Iranian law. The only connection the relationship between Tchacosh and Rockwell had to the United States is that Rockwell is incorporated under United States law, and has a place of business in this country.<sup>4</sup>

Given these circumstances, the court refused to hold that the Iranian Government's appointment of a temporary director and efforts to liquidate Tchacosh were of no legal effect.

The court then examined whether the "situs of the debt"—that is, the alleged contract claim—precluded application of the act of state doctrine. According to the court, prior cases finding that the situs of a debt was situated with the debtor were distinguishable, since the U.S. jurisdictional nexus in those cases was much stronger. For example, in cases involving Cuban expropriations and claims for accounts payable, "substantial performance of the contract had occurred in the United States, before any acts of confiscation, and importers in the United States retained the goods from which the debt obligation arose."<sup>5</sup> Because the U.S. jurisdictional nexus in this case was tenuous, and in the absence of any authority that a contract claim, such as that of Tchacosh, constituted a debt within the United States for act of state purposes, the court refused to embrace the extraterritorial exception.

<sup>2</sup> 766 F.2d 1333, 1337.

<sup>3</sup> *Id.* at 1338.

<sup>4</sup> *Id.* (footnote omitted).

<sup>5</sup> *Id.*

Finally, the court expressed its concern that judicial invalidation of the Iranian Government's acts could unduly interfere with U.S. foreign policy. The court advanced two points in this regard. First, according to the court, such a determination could adversely affect U.S.-Iran relations. Second, the court opined that a "judicial interpretation of the effect of the Iranian decrees as to Tchacosh"<sup>6</sup> might conflict with an interpretation of the Iran-U.S. Claims Tribunal, and thereby interfere with the diplomatic efforts of the executive branch.

*Sovereign immunity—Foreign Sovereign Immunities Act—subject matter jurisdiction—"commercial activity" exception*

TRANSAMERICAN STEAMSHIP CORP. v. SOMALI DEMOCRATIC REPUBLIC.  
767 F.2d 998.

U.S. Court of Appeals, D.C. Cir., July 12, 1985.

Plaintiff, Transamerican Steamship Corp., filed suit against the Somali Democratic Republic (SDR) and its instrumentality, the Somali Shipping Agency (Agency), seeking declaratory relief and damages arising from a transaction involving the shipment of grain from the United States to Somalia. Applying the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§1330, 1602-1611 (1982)) (FSIA), the district court held that it had subject matter jurisdiction to adjudicate Transamerican's claim against the Agency, but that it lacked such jurisdiction with respect to the SDR.<sup>1</sup> The U.S. Court of Appeals for the District of Columbia Circuit (per Tamm, J.) affirmed in part, reversed in part and *held*: that the district court had subject matter jurisdiction over Transamerican's claims against both defendants.

In order to implement an emergency famine relief program for Somalia, the Agency for International Development (AID) and the Somali Government executed an agreement to facilitate the shipment of grain to the SDR. The agreement incorporated AID Regulation 11 exempting commodities shipped under the program from all taxes, including import duties. The U.S. Department of Agriculture thereafter commissioned Transamerican to carry five thousand tons of corn to Somalia. Shortly before the arrival of Transamerican's ship at a Somali port, the Agency demanded a "pro forma disbursement" and warned that the vessel would be detained until the money was paid. Transamerican objected, apparently on the ground that Regulation 11 placed responsibility for such levies on the aid recipient, in this case the Somali Government. After receiving part of the disputed payment, the Agency directed Transamerican to pay the remainder to the Somali Embassy in Washington, D.C. as a condition for the release of the vessel. In order to end the costly detention of the ship, Transamerican complied with the embassy's instructions to transfer the demanded amount from a New York bank into the SDR's commercial account in Washington. After unsuccessful attempts to obtain redress through diplomatic channels, Trans-

<sup>6</sup> *Id.*

<sup>1</sup> 590 F.Supp. 968 (D.D.C. 1984), summarized in 79 AJIL 749 (1985).

american sued both the SDR and the Agency. The district court dismissed the claim against the SDR on the ground of sovereign immunity, but held that it did have subject matter jurisdiction with respect to the Agency. Both Transamerican and the Agency appealed.

The court of appeals began by emphasizing that the purpose of the FSIA is to ensure that "our citizens will have access to the courts in order to resolve ordinary legal disputes."<sup>2</sup> The court then focused on the first clause of section 1605(a)(2) of the Act, which withholds immunity when the action is based upon a foreign state's commercial activity carried on in the United States.<sup>3</sup> Applying this exception to the SDR, the court concluded that the SDR's active assistance to the Agency in extracting funds from Transamerican "exceeded the bounds of ordinary diplomatic behavior."<sup>4</sup> Unlike the district court, the court of appeals did not view the SDR as a "passive 'stakeholder'"<sup>5</sup> in the transaction:

The embassy took an active rather than a passive role in the transaction by refusing to accept payment by a check made out to the Agency and insisting instead on an electronic transfer of funds directly into SDR's own commercial bank account in Washington. Taken together, SDR's activities were essentially those of a collection agent, acting on behalf of its principal, the Agency, to wrest funds from an unwilling payor—and not [those] of a foreign sovereign diplomatically attempting to maintain friendly relations. In our view, [this] is a normal commercial function. . . .<sup>6</sup>

According to the court, "had the Agency not used its own government in the transaction, it could as easily have used a bank, a law firm, or any other commercial middleman representing its interests in the United States."<sup>7</sup> The court further observed that the act of receiving the payments at issue did not lose its commercial character because it occurred in connection with an AID program.

In a separate opinion, Judge Wald concurred with the judgment as to the SDR, but on the ground that under section 1605(a)(1) of the FSIA, the SDR's agreement to be bound by AID Regulation 11 constituted an implicit waiver of sovereign immunity in an action for damages allegedly caused by a violation of the regulation.

<sup>2</sup> 767 F.2d 998, 1001 (quoting H.R. REP. NO. 1487, 94th Cong., 2d Sess. 6 (1976)).

<sup>3</sup> Section 1605(a)(2) of the FSIA provides:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. §1605(a)(2) (1982).

<sup>4</sup> 767 F.2d at 1003.

<sup>6</sup> *Id.* at 1003.

<sup>5</sup> *Id.* at 1002.

<sup>7</sup> *Id.*

Turning to the question of jurisdiction over the Agency, the court relied on the third clause of section 1605(a)(2), which deprives a foreign state of immunity when its commercial activity outside the United States causes a direct effect in the United States. The court observed that in a previous decision it had determined that such "effects" should be both "substantial" and "direct and foreseeable";<sup>8</sup> and it held that the Agency's activities in this case satisfied these requirements. The detention of the ship and demand for payment required a transfer of an American corporation's funds from one American bank to another and resulted in Transamerican's indebtedness to an American vessel owner for time charter costs and related charges. The court also observed that anyone even slightly familiar with commercial shipping transactions could foresee that additional costs would arise from the continued detention of the ship.

This decision appears to follow the reasoning of *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*,<sup>9</sup> which suggested that in determining whether a sovereign's activity is "commercial" for purposes of the FSIA, the court should ask whether such "activity is one in which a private person could engage."<sup>10</sup> This approach is consistent with the congressional mandate that the "commercial character of the activity . . . be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."<sup>11</sup>

*Countervailing duty law—applicability to nonmarket economy countries*

CONTINENTAL STEEL CORP. v. UNITED STATES. 614 F.Supp. 548.  
U.S. Court of International Trade, July 30, 1985.

Plaintiffs, American steel and chemical companies, brought suit in the Court of International Trade, challenging a determination of the Department of Commerce, International Trade Administration, that as a matter of law, subsidies cannot be found in countries that have nonmarket economies.<sup>1</sup> The Court of International Trade (per Watson, J.) reversed the Commerce Department's determination and *held*: that the language and purpose of the relevant countervailing duty statute, 19 U.S.C. §1303 (1982), indicate that the statute is applicable to countries with nonmarket economies.<sup>2</sup>

<sup>8</sup> *Id.* at 1004 (relying upon *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1110-11 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983), *summarized in* 77 AJIL 318 (1983)).

<sup>9</sup> 647 F.2d 300 (2d Cir. 1981), *summarized in* 75 AJIL 968 (1981).

<sup>10</sup> 647 F.2d at 309.

<sup>11</sup> 28 U.S.C. §1603(d) (1982).

<sup>1</sup> This conclusion had led the Commerce Department to issue final determinations that manufacturers, producers and exporters of carbon steel wire rod in Czechoslovakia and Poland were not receiving subsidies, and to rescind investigations regarding the subsidy of potassium chloride (potash) from the Soviet Union and the German Democratic Republic.

<sup>2</sup> The U.S. Government has appealed the decision of the Court of International Trade. *United States v. Georgetown Steel Corp.*, *appeal docketed*, No. 85-2805 (Fed. Cir. Sept. 24, 1985).



Section 303 of the Tariff Act of 1930 (19 U.S.C. §1303 (1982)) provides in relevant part:

Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article of merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, . . . there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same may be paid or bestowed.

The issue before the court was whether this statute applies to nations with nonmarket economies. The Commerce Department had recognized that the language "any country" in the statute does not permit a per se exemption. The court observed, however, that the Department had posited an "additional jurisdictional question": whether governmental activities in a nonmarket economy can confer "a bounty or grant" within the meaning of the countervailing duty law. Defining subsidy as "a distortion of the operation of a market economy,"<sup>3</sup> the Commerce Department had determined that a "bounty or grant" could not be conferred in a nonmarket economy where exporting firms are subject to centralized export controls, lack a profit motive and, thus, cannot respond to incentives to production.

The Court of International Trade declared that the Commerce Department was attempting to create a "monumental exception to the law" for nonmarket economies, which was wholly contrary to the statute's purpose.<sup>4</sup> "The simple fact is that the countervailing duty law makes no distinctions based on the form of any country's economy."<sup>5</sup> Indeed, "[o]n its face, the law shows a meticulous inclusiveness and an unswerving intention to cover all possible variations of the acts sought to be counterbalanced."<sup>6</sup>

The court rejected the Commerce Department's definition of the term "subsidy," finding that governments may provide subsidies even where distortions of a market are impossible. The Department also had suggested that the concept of subsidy has no meaning in a nonmarket economy "because everything would become 'subsidized.'"<sup>7</sup> The court responded that the only real difficulty with the term "subsidy" was not one of meaning but of measurement, an issue that is precisely within the agency's expertise.<sup>8</sup>

<sup>3</sup> 614 F.Supp. 548, 552 (emphasis by court).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 550.

<sup>6</sup> *Id.* at 551.

<sup>7</sup> *Id.* at 554.

<sup>8</sup> "All that will be needed in these cases is the ability to distinguish between the normal operations of central control and the exceptional or disproportionate or unfair event. . . . Its potential difficulties certainly do not justify the exception to the law sought to be made in this case." *Id.* The court also pointed out that when the Commerce Department was faced with a similar problem of a reference point in dealing with nonmarket economies under the antidumping law, the agency solved the difficulty by looking to surrogate countries with market economies. *Id.* at 555.

The Commerce Department argued that the legislative history of the trade laws supported its interpretation of the countervailing duty statute. First, the Government contended that Congress did not intend the countervailing duty statute to apply to state-controlled economies because when it amended the antidumping statute in 1974 to provide a reference point for measuring fair market value in the case of nonmarket economies, it failed to alter the countervailing duty statute. The court responded that "the simplest implication of leaving [the countervailing duty statute] alone is that it needed no clarification to allow it to apply to all forms of economies."<sup>9</sup>

The Government's second argument was that in passing section 406 of the Trade Act of 1974 (19 U.S.C. §2536 (1982)),<sup>10</sup> which protects U.S. industries from market disruption due to surges in imports from Communist countries, Congress intended to repudiate the use of the countervailing duty law in connection with such countries. The court determined that there is no support for this position in the statutory language or legislative history of section 406. Moreover, the court observed that the countervailing duty law is not affected by the existence of possible alternative remedies.

Third, the Government pointed out that Congress, in the process of approving the Subsidies Code<sup>11</sup> through the Trade Agreements Act of 1979, provided special procedures for applying the antidumping law to nonmarket economies. However, no such treatment was provided with regard to the administration of the countervailing duty law. The Government maintained that this reflected a congressional choice of antidumping rather than countervailing duty law for use in connection with nonmarket economy countries. The court rejected this argument, noting that Article 15 of the Subsidies Code offers a country the choice of using subsidy law or antidumping law for imports from a nonmarket economy country.<sup>12</sup> The court concluded that "the 1979 Act shows a definite understanding by Congress that the countervailing duty law covers countries with nonmarket economies."<sup>13</sup>

<sup>9</sup> *Id.* at 555.

<sup>10</sup> Section 406 has proven to be a limited remedy against nonmarket economies. Of the ten investigations conducted to date, only one resulted in relief, which was merely temporary and pursuant to the emergency authority of the President granted in §406(c). *See* Proclamation No. 4714, 3 C.F.R. 8 (1981), *reprinted in* Ammonia from the U.S.S.R.-II, at A-85 (Staff Report). The Government abandoned this argument in its brief submitted on appeal. *See* Brief for Appellant, *United States v. Georgetown Steel Corp.*, No. 85-2805 (Fed. Cir. filed Nov. 25, 1985).

<sup>11</sup> Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 UST 513, TIAS No. 9619.

<sup>12</sup> The court found that Congress was aware that nonmarket economy countries had participated in the preparation of the Subsidies Code. *See* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE TEXTS OF THE TRADE AGREEMENTS NEGOTIATED IN THE TOKYO ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS, PURSUANT TO SECTION 102 OF THE TRADE ACT OF 1974, H.R. DOC. NO. 153, 96th Cong., 1st Sess. 259 (1979). Moreover, two nonmarket economy countries—Hungary and Bulgaria—had signed the Subsidies Code. INTERNATIONAL TRADE COMMISSION, ANALYSIS OF NONTARIFF AGREEMENTS, U.S.I.T.C. Inv. No. 332-101, MTN Studies 6, pt. 1, 96th Cong., 1st Sess. i-iv (Senate Comm. on Finance Print 1979).

<sup>13</sup> 614 F.Supp. at 557.



The decision in this case is significant for three reasons. First, the court's decision avoids the seemingly incongruous result that the countervailing duty statute would apply to U.S. allies while Communist countries would be excluded from its reach. Second, the countervailing duty law has never been applied to nonmarket economies as we know them today.<sup>14</sup> Yet the imposition of countervailing duties on the exports of nonmarket economy countries to the United States could contravene U.S. efforts in recent years to encourage East-West trade. Finally, the Department of Commerce now faces the arduous and potentially impossible task of identifying and quantifying alleged subsidies in nonmarket economy countries, where all facets of the economy are subsidized and where accurate, current data are difficult to obtain.

#### DECISIONS OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL

*Arbitration—contract termination—"changed circumstances"—damages—lost profits*

QUESTECH, INC. v. MINISTRY OF NATIONAL DEFENCE OF THE ISLAMIC REPUBLIC OF IRAN. AWD 191-59-1.

Iran-United States Claims Tribunal, The Hague, September 20, 1985.

Questech, Inc., a U.S. corporation, filed a claim before the Iran-United States Claims Tribunal<sup>1</sup> for breach of contract and sought compensation for services rendered and lost profits. Claimant was one of several U.S. companies that contracted with Iran prior to the Islamic Revolution to modernize and expand the Iranian Air Force's electronic intelligence-gathering system. This was known as the IBEX project. Claimant's responsibility was to evaluate the planning and implementation of a training program conducted by another contractor.<sup>2</sup> Claimant provided these services in accordance with the contract. However, in the wake of the revolution, claimant suspended its performance, invoking the contract's force majeure clause. During the latter half of 1979, respondent informed claimant that it considered the contract terminated since the circumstances under which the IBEX contracts had been concluded had fundamentally changed in the course of the revolution. Chamber One of the Iran-United States Claims Tribunal (per Böckstiegel, Chairman) found for claimant, *holding* that because of the security-sensitive nature of the contract, respondent's termination of the contract was autho-

<sup>14</sup> In the 1930s, the countervailing duty law was applied against tsarist Russia and Nazi Germany, in circumstances in which central governments exercised a high degree of central control. The court observed, however, that these proceedings did not involve nonmarket economies "as the term is being currently used." *Id.* at 555. In 1983 the U.S. textile and apparel industries filed a countervailing duty petition against the People's Republic of China, and the ITA initiated an investigation. 48 Fed. Reg. 46,600 (Oct. 13, 1983). Subsequently, however, petitioners withdrew their petition and the investigation was terminated. 48 Fed. Reg. 55,492 (Dec. 13, 1983).

<sup>1</sup> For background information on the Iran-United States Claims Tribunal, see 77 AJIL 642 (1983).

<sup>2</sup> The other contractor was Sylvania Technical Systems, Inc., whose claims against Iran were the object of an award rendered by Chamber One in June 1985. See 80 AJIL 181 (1986).

rized under the "changed circumstances" doctrine. However, claimant was entitled to payment for work performed before the termination and direct damages suffered from the termination but not to lost profits.

The principal issue before the Chamber was the validity of respondent's termination. Claimant contended that respondent breached the contract when it did not resume performance after the force majeure conditions in Iran had ceased late in the spring of 1979. Respondent contended that the contract was terminated because of changed circumstances and denied that it had unilaterally repudiated the contract. The Chamber agreed that force majeure had prevented the parties from performing their respective obligations for a certain period, but held that the respondent had failed to prove that force majeure conditions had continued beyond mid-1979. The Chamber found that in the summer of 1979 the Iranian Government made a "deliberate policy decision not to continue with American contractors in a project that related to secret military intelligence operations."<sup>3</sup> Finding that the contract did not expressly entitle respondent to terminate, the Chamber applied the doctrine of "changed circumstances" (*clausula rebus sic stantibus*), a general principle of law expressly recognized in the Vienna Convention on the Law of Treaties and Article V of the Claims Settlement Declaration.<sup>4</sup> Observing that "changes which are inherent parts and consequences of the Iranian Revolution must be taken into account," the Chamber continued:

The fundamental changes in the political conditions as a consequence of the Revolution in Iran, the different attitude of the new Government and the new foreign policy especially towards the United States which had considerable support in large sections of the people, the drastically changed significance of highly sensitive military contracts . . . especially those to which United States companies were parties, are all factors that brought about such a change of circumstances as to give the Respondent a right to terminate the Contract.<sup>5</sup>

In a separate concurring opinion, Howard Holtzmann, the U.S.-appointed arbitrator, disagreed with this rationale, arguing that under all systems of law recognizing the doctrine, the changed circumstances must have occurred independently of the action of the party invoking or relying upon the doctrine. With respect to customary international law, Holtzmann stated that it is "a recognized principle of law that a State cannot avoid its obligations by a change in government or 'political conditions.'"<sup>6</sup> He further asserted

<sup>3</sup> AWD 191-59-1, slip op. at 17.

<sup>4</sup> See Article 62 of the Vienna Convention on the Law of Treaties, May 23, 1969, UNTS Regis. No. 18,232 (entered into force Jan. 27, 1980), reprinted in 63 AJIL 875 (1969) and 8 ILM 679 (1969). Article V of the Claims Settlement Declaration of Jan. 19, 1981, reprinted in 75 AJIL 422, 424 (1981), states: "The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances."

<sup>5</sup> Slip op. at 22.

<sup>6</sup> Separate Opinion of Howard M. Holtzmann, AWD 191-59-1, slip op. at 7 (relying upon RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §161 (1965);

that the "changed circumstances" language of the Claims Settlement Declaration was not intended to expand the traditional scope of the "changed circumstances" doctrine so as to make the doctrine "determinative in a situation in which [it is] not applicable under the relevant principles of commercial and international law."<sup>7</sup> Nevertheless, on the basis of an analysis of the Questech contract, Holtzmann concluded that the contract itself entitled the Iranian Government to terminate at will because the contract gave Iran "complete control over the amount of work to be done by the Claimant," even to the point of reducing the work level to zero.<sup>8</sup>

Turning to the issue of damages, the Chamber held that respondent was liable for all payments due up to the date of termination and all losses directly related to the termination. However, because respondent was under no obligation to continue the contract, it was not liable for lost future profits. The Chamber reasoned that claimant could "not expect that the Contract would remain unaffected by changes in such a highly sensitive military domain,"<sup>9</sup> and distinguished two other decisions where the Tribunal had awarded damages for lost profits upon unilateral Iranian contract termination on the ground that the contracts in those cases lacked the exceptional character of the Questech contract.<sup>10</sup> Holtzmann concurred in the denial of an award for lost profits, finding that because of Iran's control over the amount of claimant's contractual obligations, claimant had no reasonable expectation to recover lost profits.

Chairman Böckstiegel's application of the changed circumstances doctrine is of considerable significance, in that he departs from the traditional rule that a party may not invoke changed circumstances as a ground for terminating a contract when the change of circumstances was not beyond its control. While the Questech contract was a private law contract which, pursuant to its own terms, was governed by Iranian law, Böckstiegel referred, by way of analogy, to Article 62 of the Vienna Convention on the Law of Treaties. His analysis, however, does not fall squarely within the scope of Article 62 because it is doubtful whether the change of circumstances relied upon by Böckstiegel in effect "radically . . . transform[ed] the extent of the obligations which had still to be performed under the contract."<sup>11</sup> Furthermore, the change of government caused by the Iranian Revolution did not discharge Iran's contractual obligations according to the international law principle that the succession of governments has to be sharply distinguished from the

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RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §208 (Tent. Final Draft July 15, 1985)). Holtzmann does not discuss the Vienna Convention on the Law of Treaties.

<sup>7</sup> Separate Opinion of Arbitrator Holtzmann, slip op. at 13.

<sup>8</sup> *Id.* at 14.

<sup>9</sup> AWD 191-59-1, slip op. at 23.

<sup>10</sup> See *R. N. Pomeroy et al. v. Government of the Islamic Republic of Iran*, AWD 50-40-3 (June 8, 1983) (Chamber 3); *Pomeroy Corp. v. Government of the Islamic Republic of Iran*, AWD 51-41-3 (June 8, 1983) (Chamber 3).

<sup>11</sup> See Art. 62, para. 1(b) of the Vienna Convention, *supra* note 4.

succession of states.<sup>12</sup> However, some support for Böckstiegel's conclusion may be found, again by way of analogy, in Article 56 of the Vienna Convention, which provides that when a treaty does not contain a termination clause, a right of denunciation or withdrawal may be implied from the nature of the treaty.

*Arbitration—interest award—attorneys' fees*

SYLVANIA TECHNICAL SYSTEMS, INC. v. ISLAMIC REPUBLIC OF IRAN. AWD 180-64-1.

Iran-United States Claims Tribunal, The Hague, June 27, 1985.

Claimant, a U.S. corporation, filed a breach of contract claim in the Iran-United States Claims Tribunal against respondent, the Iranian Government. The contract called for claimant to construct and provide training on an electronic intelligence-gathering system for the Iranian Air Force. Claimant alleged that as a result of the revolution in Iran, respondent had breached the contract, causing claimant substantial loss. Chamber One (per Böckstiegel, Chairman) *held* for claimant and awarded damages, interest and attorneys' fees.

The Chamber held that Iran was excused on force majeure grounds from performing prior to February 15, 1979. However, after this time, "the Iranian Government made a deliberate policy decision not to continue with American contractors in a project that related to secret military intelligence operations."<sup>1</sup> The Chamber held that this was a breach, and awarded claimant \$7,331,105.58 in damages.

Of more significance are the Chamber's findings as to interest and attorneys' fees. Claimant argued that the amount of interest to be received on its award should be based on the prime rate of interest charged by Citibank in the United States during the period between breach and payment. The use of the prime rate figure would have given claimant an average rate of

<sup>12</sup> Cf. Report of the International Law Commission to the General Assembly, [1966] 2 Y.B. INT'L L. COMM'N 172, 256-60, UN Doc. A/CN.4/SER.A/1966/Add.1. *See in particular id.* at 259, para. 10:

Some members of the Commission favoured the insertion of a provision making it clear that a subjective change in the attitude or policy of a Government could never be invoked as a ground for terminating . . . a treaty. . . . Other members, while not dissenting from the view that mere changes of policy on the part of a Government cannot normally be invoked as bringing the principle into operation, felt that it would be going too far to state that a change of policy could never in any circumstance be invoked as a ground for terminating a treaty. . . . The Commission considered that the definition of a "fundamental change of circumstances" in paragraph 1 [of Article 62] should suffice to exclude abusive attempts to terminate a treaty on the basis merely of a change of policy, and that it was unnecessary to go further into the matter in formulating the article.

*See also* UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES, OFFICIAL RECORDS, FIRST SESSION, SUMMARY RECORDS OF THE PLENARY MEETINGS AND OF THE MEETINGS OF THE COMMITTEE OF THE WHOLE 369-70, 372, UN Doc. A/CONF.39/11 (1969) (statements by Vallat and Harry, respectively).

<sup>1</sup> AWD 180-64-1, slip op. at 21.

14.03 percent for the period 1979 through 1984, and a rate of 10.03 percent for each month after 1984.

The Chamber agreed that claimant was entitled to an interest award, but disagreed with claimant's choice of reference for the rate of interest and *held* as follows:

Unless there are special circumstances, the rates stipulated in a contract will be accepted by the Tribunal. In the absence of a contractually stipulated rate of interest, the Tribunal will derive a rate of interest based approximately on the amount that the successful claimant would have been in a position to have earned if it had been paid in time and thus had the funds available to invest in a form of commercial investment in common use in its own country. Six-month certificates of deposit in the United States are such a form of investment for which average interest rates are available from an authoritative official source.<sup>2</sup>

The Chamber acknowledged that there is some precedent in arbitral tribunals for using the prime rate. It observed, however, that uniformity can better be accomplished by relying on interest rates from certificates of deposit, since they are available to all investors at substantially the same rates.

[B]orrowing rates vary depending on the credit rating of each particular party, not all of whom are able to borrow at the prime rate, and some of whose credit standings may change during the relevant period. Also, not all parties who suffer from delayed payment actually borrow. For these reasons, basing a general interest rate in all Awards on the prime rate would often not be realistic.<sup>3</sup>

Therefore, the Chamber looked to the average rate of interest paid on 6-month certificates of deposit in the United States from 1979 through 1984 and applied an interest rate of 12 percent to claimant's award.

The Chamber also discussed principles to be applied in awarding costs for legal representation and assistance. In this respect, the Chamber observed that while the Tribunal's Rules provide that the unsuccessful party generally bears nonlegal costs, "the Rules are not so clear with regard to costs for legal representation and assistance."<sup>4</sup> The Chamber noted an ambiguity in this connection by comparing two of the Tribunal's Rules: Article 38, paragraph 1(c) provides that the Tribunal shall fix the costs for the successful party "only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable," while Article 40, paragraph 2 provides that the Tribunal "shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable."<sup>5</sup> Taking these Rules together, the Chamber concluded that "the test of 'reasonableness' as required here should be applied in a rather cautious manner."<sup>6</sup>

Turning to more general considerations, the Chamber observed that: (1) thus far the Tribunal has not awarded costs in all cases; (2) even where costs

<sup>2</sup> *Id.* at 31-32.

<sup>4</sup> *Id.* at 36.

<sup>6</sup> *Id.*

<sup>3</sup> *Id.* at 32-33.

<sup>5</sup> *Id.*

have been awarded, the amounts have generally been less than claimed, with no distinction made between costs for legal representation and other costs; (3) unlike the situation in ordinary litigation or arbitration, the successful party before the Tribunal will not have to enforce the award, but rather will be paid automatically out of the Security Account established by the Algiers Accords;<sup>7</sup> and (4) in commercial cases in courts in the United States, each party generally bears the costs of its legal counsel.

The Chamber further observed that in addition to these general considerations, "the circumstances of each case will have to be taken into account when determining to what extent the amount of costs for legal representation and assistance is reasonable."<sup>8</sup> In the present case, the Chamber determined that claimant's costs in presenting the case in U.S. courts did not come within the application of Article 38. The Chamber also noted that the case involved factual and legal issues of neither extreme nor ordinary complexity when compared to other cases before the Tribunal. Applying these criteria to the present case, the Chamber awarded claimant \$50,000 of the \$265,000 claimed for legal costs.<sup>9</sup>

In a separate opinion, Howard Holtzmann, the American-appointed arbitrator in Chamber One, stated that while he welcomed the Chamber's decision to award costs, he would have awarded the full \$265,000.<sup>10</sup> Holtzmann noted that the issues addressed by claimant's counsel were complex, that claimant's figures appeared reasonable and well documented, and that claimant had already agreed to pay the bill submitted by its counsel. To Holtzmann, the "fact that a businessman has agreed to pay a bill . . . is a strong indication that the amount billed was considered reasonable by a reasonable man spending his own money, or the money of the corporation he serves. That is a classic test of reasonableness."<sup>11</sup>

The decision fails to clarify whether the interest rate specified represents simple interest or is to be compounded. It can be inferred, however, from language in the decision that simple interest only is to be applied.<sup>12</sup> This is regrettable, considering that certificates of deposit themselves pay compound interest. Moreover, the large sums and long time periods involved in Claims Tribunal cases make this a question of considerable financial significance.

<sup>7</sup> For background information on the Algiers Accords and the establishment of the Tribunal, see 77 AJIL 642 (1983).

<sup>8</sup> Slip op. at 37.

<sup>9</sup> *Id.* at 37-38. The sum of \$265,000 was the amount claimed for legal costs relating to claimant's action before the Tribunal. The total amount claimed for legal costs, including fees for prosecuting the related case in U.S. court, was \$830,093.76.

<sup>10</sup> Holtzmann stated that in his view, claimant's costs of litigation in the United States should not be granted because, *inter alia*, such costs are not covered by Articles 38 and 40 of the Tribunal's Rules.

<sup>11</sup> Separate Opinion of Howard M. Holtzmann, AWD 180-64-1, slip op. at 7-8.

<sup>12</sup> The Chamber observed that in the past, the Tribunal has never awarded compound interest. AWD 180-64-1, slip op. at 31. Indeed, in one of the cases cited, the Tribunal stated that it is a "settled" rule of international law that compound interest is not allowable. *R. J. Reynolds Tobacco Co. and Iran*, AWD 145-35-3 (Aug. 6, 1984) (Chamber 3).



It should also be noted that Chairman Böckstiegel's attempt to establish a standard rate of interest for Tribunal awards has not met with complete success. Post-*Sylvania* decisions have not all followed the standard discussed in this case.<sup>13</sup>

The portion of the decision dealing with legal fees raises questions as well. While the Chamber opines that a successful party should, in most cases, receive its attorneys' fees, it proceeded to award less than 20 percent of the amount claimed. This result suggests that parties appearing before the Tribunal must still expect to bear a large portion of their attorneys' fees.

<sup>13</sup> See, e.g., *International Schools Services, Inc. and Iranian Copper Industries Co.*, AWD 194-111-1 (Oct. 10, 1985) (Chamber I) (awarding interest payment of 10%).

## CURRENT DEVELOPMENTS

### INDIGENOUS PEOPLES: AN EMERGING OBJECT OF INTERNATIONAL LAW

The Working Group on Indigenous Populations, an organ of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, ended its fourth annual session last August by distributing seven "draft principles" to governments and nongovernmental organizations (NGOs) for comment as the first step in preparing "a draft declaration on indigenous rights, which may be proclaimed by the General Assembly."<sup>1</sup> For the first time since indigenous organizations took their concerns to the international level in 1977, a formal commitment has been made to the development of new law, probably in time for the "cinquecentennial" in 1992 of the "discovery" of the Americas and a proposed international indigenous year.<sup>2</sup>

Over the past 4 years, most governments have accepted the inevitability of a declaration, as evidenced by the increase in the number and rank of governmental observer delegations and the decrease in defensive statements. While only Norway, the Netherlands and Denmark expressed more than "interest" in the working group at the 1982 session of the Commission on Human Rights, many affected governments, such as Australia, Canada and the United States, as well as China, Syria, Cyprus, the Gambia and the German Democratic Republic, praised and encouraged its work at the 1985 session. Seven Latin American and Eastern European countries abstained from voting on the working group's first mandate in 1982.<sup>3</sup> By contrast, the most recent change in the mandate, strengthening the group's drafting role, was quickly adopted without a vote.<sup>4</sup>

Several governments took advantage of the working group's third and fourth sessions to unveil recent initiatives in promoting indigenous land rights and cultural development. Australia committed itself to observing "five principles" in recognizing indigenous land rights at the third session and reaffirmed them, under fire from aboriginal groups, at the fourth. Canada asserted its willingness to negotiate the terms of Indian self-government at both sessions. Argentina used the fourth session to announce new land-

<sup>1</sup> Report of the Working Group on Indigenous Populations on its Fourth Session, UN Doc. E/CN.4/Sub.2/1985/22, Ann. II. The full text of the draft principles is set out in the text at note 47 *infra*.

<sup>2</sup> Study of the Problem of Discrimination against Indigenous Populations, UN Doc. E/CN.4/Sub.2/1983/21/Add.8, para. 633.

<sup>3</sup> Commission on Human Rights Resolution [hereinafter cited as Comm'n Res.] 1982/19 (Mar. 10). Brazil called for the vote and abstained, together with Poland, the USSR, Bulgaria, the Byelorussian SSR, Cuba and the Philippines. Cuba has subsequently taken an interest and now has a member on the working group.

<sup>4</sup> Comm'n Res. 1985/21 (Mar. 11).

claims and social welfare legislation, and New Zealand to explain proposals to constitutionalize its 1840 treaty with the Maoris.

*Development of the Indigenous Concept*

The United Nations system first addressed itself formally to indigenous issues in 1949, when the General Assembly invited the Sub-Commission to study the condition of indigenous Americans in the hope that "the material and cultural development of these populations would result in a more profitable utilization of the resources of America to the advantage of the world."<sup>5</sup> The United States objected strenuously, which resulted not only in the termination of the inquiry, but also in the temporary suspension of the Sub-Commission itself.<sup>6</sup> However, this initiative was prompted more by the Cold War and the prospective development of the South American interior than by studied concern for the welfare of indigenous communities.

Chiefly responding to reports of labor discrimination in Latin America, the International Labour Organisation adopted Convention No. 107, Indigenous and Tribal Populations, in 1957. The Convention starts from the premise that the "social, economic or cultural situation [of indigenous peoples] hinders them from benefiting fully from the rights and advantages enjoyed by other elements of the population" and from "sharing fully in the progress of the national community of which they form part." Emphasizing the "protection and integration" of indigenous peoples, the Convention obliges state parties to develop "co-ordinated and systematic action for their progressive integration," through "collaboration" rather than "force or coercion." Criticism of the Convention as paternalistic has led the ILO Secretariat to schedule a revision; a representative committee of experts was to be appointed by November 1985, and a meeting of experts held in September 1986.

Convention No. 107 nevertheless contains the first, and to date the only, binding standards on indigenous land rights. It does not merely recognize "the right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy." It also recognizes their customary laws regarding land use and inheritance, and their right to be compensated in money or in kind for lands appropriated by the national government for development purposes.<sup>7</sup> Moreover, Convention No. 107 makes the first attempt at defining indigenous populations, referring to "their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation" and their tendency to "live more in conformity with the[ir own] social, economic and cultural institutions."<sup>8</sup>

<sup>5</sup> GA Res. 275 (III) (May 11, 1949).

<sup>6</sup> 11 UN ESCOR (397th mtg.) at 191, UN Doc. E/SR (1949).

<sup>7</sup> Arts. 11-13, Convention (No. 107) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, INTERNATIONAL LABOUR ORGANISATION, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS, 1919-1981, at 858 (1982).

<sup>8</sup> *Id.*, Art. 1(b).

International acceptance of a definition has proved elusive and will be discussed further below.

In 1971 the Sub-Commission appointed Mexican Ambassador José R. Martínez Cobo to conduct a thorough study of "discrimination against indigenous populations." The final part of the report, which contains its conclusions and recommendations, though only completed in 1983,<sup>9</sup> has already been accepted as authoritative. The Sub-Commission called it "a reference work of definitive usefulness"<sup>10</sup> and directed the working group to rely on it in setting standards.<sup>11</sup> This part of the report was warmly received by members of the working group as well.

The Martínez Cobo report concludes that existing human rights standards "are not fully applied" to indigenous peoples and, moreover, are "not wholly adequate" to the task. Consequently, a declaration leading to a convention is required.<sup>12</sup> Most important, the special rapporteur was persuaded that "self-determination, in its many forms, must be recognized as the basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future."<sup>13</sup> "In essence," the report states, self-determination

constitutes the exercise of free choice by indigenous peoples, who must, to a large extent, create the specific content of this principle, in both its internal and external expressions, which do not necessarily include the right to secede from the State in which they may live and to set themselves up as sovereign entities. This right may in fact be expressed in various forms of autonomy within the State.<sup>14</sup>

In addition, the report concludes that "indigenous peoples have a natural and inalienable right to keep the territories they possess and claim the lands which have been taken from them," and it proposes detailed standards for the reconciliation of land claims.<sup>15</sup>

Three international conferences have also drawn attention to indigenous rights. The international NGO Conference on Discrimination against Indigenous Peoples of the Americas, held at Geneva in 1977, was the first to attract indigenous representatives. Its final report emphasized "the right of indigenous peoples and nations to have authority over their own affairs," and it set forth a draft declaration of principles calling for the recognition of indigenous peoples as subjects of international law.<sup>16</sup> The World Conference to Combat Racism and Racial Discrimination, which was held at Geneva in 1978, "endorse[d] the right of indigenous peoples to maintain their traditional structure of economy and culture, including their own lan-

<sup>9</sup> UN Doc. E/CN.4/Sub.2/1983/21/Add.8.

<sup>10</sup> Sub-Commission on Prevention of Discrimination and Protection of Minorities Resolution [hereinafter cited as Sub-Comm'n Res.] 1984/35A, 4th preambular para. (Aug. 30).

<sup>11</sup> Sub-Comm'n Res. 1985/22, para. 4(a) (Aug. 29).

<sup>12</sup> UN Doc. E/CN.4/Sub.2/1983/21/Add.8, paras. 624, 625, 628.

<sup>13</sup> *Id.*, para. 580.

<sup>14</sup> *Id.*, para. 581.

<sup>15</sup> *Id.*, para. 513.

<sup>16</sup> The report of the conference is reprinted in the November 1977 issue of the *American Indian Journal*.

guage, and also recognize[d] the special relationship of indigenous peoples to their land and stresse[d] that their land, land rights and natural resources should not be taken away from them."<sup>17</sup> Finally, a second international NGO meeting, the Conference on Indigenous Peoples and the Land, was convened at Geneva in 1981. That conference called for the establishment of a United Nations working group on indigenous peoples so that "indigenous nations and peoples [could] submit their complaints and make their demands known."<sup>18</sup>

#### *Establishment of the Working Group*

Following the lead of the two NGO conferences, the Sub-Commission recommended the establishment of a pre-sessional Working Group on Indigenous Populations, and the Commission and ECOSOC approved.<sup>19</sup> The working group first met in August 1982 with members from Norway, Yugoslavia, the Sudan, Panama and Syria.

The original mandate of the working group consisted of two parts: (1) "to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations, . . . to analyze such materials, and to submit its conclusions to the Sub-Commission"; and (2) to "give special attention to the evolution of standards concerning the rights of indigenous populations, taking account of both the similarities and differences in the situations and aspirations of indigenous populations throughout the world." No one at the time was quite certain how the second element would be pursued, i.e., whether the working group was to draft an instrument for consideration by the General Assembly, or was simply to develop a body of principles for its own use as a data-gathering body. Governments agreed with Chairman Eide that standard-setting discussions would be premature.

In 1984, however, Australia, Canada and several indigenous organizations expressed concern that the working group was merely compiling data uncritically. The Sub-Commission thereupon "request[ed] the Working Group henceforth to focus its attention on the preparation of standards on the rights of indigenous populations," and accordingly "to consider in 1985, the drafting of a body of principles on indigenous rights based on relevant national legislation, international instruments and other juridical criteria."<sup>20</sup> The Commission approved this new emphasis in the working group's charge and urged the group "to intensify its efforts to develop international standards based on a continued and comprehensive review of developments . . . and of the situations and aspirations of indigenous populations throughout the world."<sup>21</sup>

<sup>17</sup> UN Doc. A/CONF.92/40, at 14 (1978).

<sup>18</sup> The report of the conference was published by the World Federation of Democratic Youth (1981).

<sup>19</sup> Sub-Comm'n Res. 2 (XXXIV) (Sept. 8, 1981); Comm'n Res. 1982/19 (Mar. 10); ECOSOC Res. 1982/34 (May 7).

<sup>20</sup> Sub-Comm'n Res. 1984/35B (Aug. 27). <sup>21</sup> Comm'n Res. 1985/21 (Mar. 11).

A further refinement was made in 1985, when the Sub-Commission

endors[ed] the Plan of Action adopted by the Working Group for its future work . . . as well as its decision to emphasize in its forthcoming sessions the part of its mandate related to standard-setting activities, with the aim of producing, in due course, a draft declaration on indigenous rights which may be proclaimed by the General Assembly.<sup>22</sup>

It is now clear that the working group's immediate goal will be a declaration, and that the group will become more like a drafting committee, its data-gathering function serving as an aid to drafting rather than an end in itself.

### *Regional Scope and Definition*

The term "indigenous" has emerged in practice over the years and (like "peoples") has no accepted definition. Its existence, in fact, is an accident of history. During Fourth Committee debates on decolonization 30 years ago, Belgium observed that the Covenant of the League of Nations called on states to protect "indigenous populations."<sup>23</sup> Belgium argued that such groups must be included in the concept of "non-self-governing territories" under the United Nations Charter.<sup>24</sup> "Similar problems existed wherever there were underdeveloped ethnic groups," the Belgian representative maintained, "in America as well as in Asia or Africa."<sup>25</sup> American states, however, insisted that the Indians had been assimilated and were "an integral part of the nation."<sup>26</sup>

The matter was never formally resolved. Thus, General Assembly Resolution 1541 (XV) speaks ambiguously of territories that are "geographically separate and distinct ethnically and/or culturally," without specifying whether the separation must be liquid or solid. In practice, however, chapter XI has been accepted as chiefly applicable to overseas colonization.<sup>27</sup> Situations involving enclaves or "internal" colonization have continued to be considered, but as problems of "indigenous populations," not of "peoples" or "minorities." Accordingly, the Martínez Cobo study falls under the category of "discrimination" rather than the other side of the Sub-Commission's mandate, "protection of minorities."<sup>28</sup>

Definition was the first substantive issue debated in the working group. India insisted on distinguishing between cases of recent immigration, such as the Americas, and situations in Asia involving historical coexistence and political integration. The Yugoslav member of the working group, Ivan Toševski, agreed that definition must precede standard setting, a practice

<sup>22</sup> Sub-Comm'n Res. 1985/22 (Aug. 29).

<sup>23</sup> Article 22 of the Covenant of the League of Nations uses the terms "peoples not yet able to stand for themselves" and "indigenous population" interchangeably.

<sup>24</sup> UN CHARTER, ch. XI.

<sup>25</sup> 7 UN GAOR C.4 (253d mtg.) at 22-23, UN Doc. A/C.4/SR.253 (1952).

<sup>26</sup> *Id.* at 55.

<sup>27</sup> See generally Barsh, *Indigenous North America and Contemporary International Law*, 62 OR. L. REV. 73, 84-90 (1983).

<sup>28</sup> Similarly, the Sub-Commission's agenda refers to "Discrimination against indigenous populations." See Sub-Comm'n Res. 1984/35B, para. 11 (Aug. 30).

he had applied in his own Working Group on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities. Indigenous observers, however, argued that definition would be inappropriate without more broadly representative indigenous participation: a few groups from North America and Australia had no right to speak for Latin American or Asian peoples. While skeptical of the notion of "separate development," Australia and Canada supported the call for indigenous "self-definition."

The working group resolved to defer its consideration of definition, only noting the importance of both "objective" criteria such as "historical continuity" and "subjective" factors including self-identification.<sup>29</sup> Yet at the second session in 1983, Asian and Latin governments again urged that attention be given to definition. So Chairman Eide asked the Secretariat to submit a discussion draft based on the Martínez Cobo study. The draft defines as "indigenous" groups "having a historical continuity with pre-invasion and pre-colonial societies, [which] consider themselves distinct from other sectors of the societies now prevailing in those territories."<sup>30</sup> Culture, language, ancestry and occupation of the land all constitute evidence of continuity. "An indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of [their] members (acceptance by the group)."

While indigenous populations, so defined, are difficult to distinguish from peoples or colonies (except for the absence of the "blue water" factor), most governments appeared satisfied that adequate limits had been drawn. At the working group's third session in 1984, Australia praised this "flexible" approach based on self-definition and group acceptance, and Eide, now serving as spokesman for the Norwegian Government, relied on the Secretariat's working definition to distinguish indigenous populations from minorities. "Indigenous populations existed in the area prior to [its] settlement by those groups which are presently dominant, and their way of life, [including] their use of resources and thereby also their cultural traditions, is distinct from that of the presently dominant group." Canada observed that groups sharing "communal and spiritual relationships with the land, and reliance on traditional pursuits for subsistence," could be found everywhere in the world; it hoped that none would be "excluded arbitrarily from consideration simply because they are not traditionally identified as indigenous."

The question of definition was also raised, inescapably, during discussion of renewed proposals for a United Nations Voluntary Fund for Indigenous Populations. Indigenous observers argued that financial aid and diplomatic good offices were most needed to increase indigenous representation from Latin America and Asia. Privately, the United States insisted on language that would plainly include the Soviet Union's tribal peoples, while India threatened to block any resolution unless it was limited expressly to "the

<sup>29</sup> UN Doc. E/CN.4/Sub.2/1982/33, para. 42.

<sup>30</sup> UN Doc. E/CN.4/Sub.2/AC.4/1983/CRP.2. The author was A. Willemsen-Diaz, who also wrote most of the Martínez Cobo report.

Americas, Australia and the Arctic regions." In the end, a compromise was reached that referred to the need "to secure a broad geographical representation"<sup>31</sup> and to involve indigenous groups "in all parts of the world."<sup>32</sup>

The issue of regional scope nonetheless reemerged in 1985 at the working group's fourth session. The United States complained that "unfortunately large areas of the world remain unrepresented" because they are "either unable, or, more importantly, are not permitted to be present." Bangladesh countered that "indigenous" refers only to "those countries where racially distinct people coming from overseas established colonies and subjugated the indigenous populations." "The entire population" of Bangladesh was autochthonous, by comparison, and all had "coexisted" prior to the fomentation of ethnic divisions by British administrators. Indonesia described its own history similarly, and India maintained that "ethnically speaking, most of the existing tribes in India share their origins with the neighbouring non-tribal population." In Indian law, "tribal" referred to "underdeveloped," rather than colonized, groups and entitled them to a "system of positive discrimination."<sup>33</sup>

The USSR, India and China have also maintained that there are no "indigenous" peoples in Asia, only minorities, and that, as Soviet Ambassador V. Sofinsky told the Sub-Commission in 1985, "indigenous" situations only arise in the Americas and Australasia where there are "imported" populations of Europeans. This attempt to reassociate indigenousness with classic colonialism was picked up, interestingly, by Mexico, which told the working group's fourth session that the marginalization of Indians "began with colonialism, and thereafter [continued] with internal colonialism and the expansion of a capitalist agricultural economy." It was virtually impossible, the Mexican observer concluded, to distinguish between indigenous populations and "peoples" entitled to self-determination.

Indigenous groups continue to oppose definition, contending that it is their concern, rather than that of states. They also understand that a superpower confrontation over classification of the Soviet Union's tribal peoples could neutralize the working group. Nevertheless, some have argued repeatedly that "indigenous" populations should be considered "peoples" in the sense of chapter XI of the Charter. "Those peoples we call indigenous are nothing more than colonized peoples who were missed by the great wave of global decolonization following the second world war," the Mikmaq delegation told the first session,<sup>34</sup> "particularly where independence was

<sup>31</sup> Sub-Comm'n Res. 1984/35C, final operative subpara. (d) (Aug. 30).

<sup>32</sup> Comm'n Res. 1985/21 (Mar. 11), and 1985/38 (May 30). Although this traditionally has been an issue between the United States, on the one hand, and the USSR and India, on the other, at the working group's fourth session the Holy See pointedly referred to "indigenous peoples of all continents."

<sup>33</sup> For an academic version of India's position, see, e.g., Sinha, *A Special Deal for Tribals in India: A Historical Appraisal*, *TRIBE*, No. 4, 1970, at 1 (published by Tribal Research Institute).

<sup>34</sup> A point also raised, *inter alia*, in UN Docs. E/CN.4/Sub.2/AC.4/1983/CRP.3, and E/CN.4/Sub.2/1985/NGO/9, and in a recent intervention on the question of minorities summarized in UN Doc. E/CN.4/Sub.2/1985/SR.15, paras. 18-23.



granted, not to the original inhabitants of a territory, but to an intrusive and alien group newly arrived." The United States and Brazil countered that Indians participate in national institutions to an extent that constitutes "integrated." The United States emphasized its 1934 Indian Reorganization Act, under which tribes ratified charters of local self-government and elected local officers.<sup>35</sup>

At the same time, indigenous groups have reacted vigorously to any suggestion that they are simply a special case of "minorities." In consequence, Jules Deschênes, the Sub-Commission's rapporteur on the definition of minorities, deferred to future deliberations of the Working Group on Indigenous Populations and suggested that "we should not attempt to deal with the question of indigenous populations" in discussing the rights or identity of minorities.<sup>36</sup> Argentina and Norway, however, still referred to "indigenous and other minorities" at the working group's fourth session, and the British member of the Sub-Commission questioned whether distinguishing indigenous groups from minorities was meaningful in Europe.<sup>37</sup>

Members of the working group expressed their views on this question for the first time at the fourth session. Yugoslav member Toševski argued that international law recognizes only "peoples" and "minorities"; "indigenous" groups, he said, must be one or the other. The working group was exceeding its authority by developing a new category of collective rights, he continued, and it should probably leave the matter to the working group on minorities, which he chairs. This prompted the Cuban member, Miguel Alfonso Martínez, to remind the working group of its mandate from ECOSOC, which admits of no doubt about the general acceptance of "indigenous" as an evolving, albeit as yet undefined, legal category. The Chinese member, Gu Yijie, recalled the "working definition," which, she observed, bears more relation to "peoples" than "minorities." "Historically speaking," she explained, "the concept of indigenous populations is associated with colonialism and aggression by foreign nations or powers," which result in the dispossession and isolation of those populations. Minorities reflect "different historical backgrounds" and must be treated separately.

Although the terms "indigenous populations" and "indigenous peoples" have sometimes been used interchangeably by observers at the working group, "populations" has generally been used in reports and resolutions to avoid any implicit recognition of the right to self-determination. The term "peoples," however, dominates the Sub-Commission's resolution on the fourth report of the working group.<sup>38</sup> The distinction between "indigenous" and "colonized," which stemmed in large part from the efforts of Asian states to distinguish their situations from those of the Americas, is clearly breaking down.

<sup>35</sup> For two views of the reorganization program, see Barsh, *When Will Tribes Have a Choice?*, in *RETHINKING INDIAN LAW* 43 (National Lawyers Guild, Committee on Native American Struggles ed., 1982); and Washburn, *A Fifty-Year Perspective on the Indian Reorganization Act*, 86 *AM. ANTHROPOLOGIST* 279 (1984).

<sup>36</sup> UN Doc. E/CN.4/Sub.2/1985/31, paras. 32-38.

<sup>37</sup> UN Doc. E/CN.4/Sub.2/1985/SR.14. <sup>38</sup> Sub-Comm'n Res. 1985/22 (Aug. 29).

*Role of the United Nations*

The problem of indigenous populations can be viewed as either discrimination or assimilation, i.e., as lack of equality or forced equality with the population of the administering state. The ILO took the first view in Convention No. 107 and encouraged states to remove all institutional obstacles to the complete integration of indigenous communities. Similarly, the Committee on the Elimination of Racial Discrimination has routinely sought to determine whether indigenous populations are accorded equal access to health, education and employment, and equal rights of land ownership.<sup>39</sup> The Human Rights Committee established pursuant to the International Covenant for Civil and Political Rights has dealt with indigenous peoples as "minorities" under Article 27 of the Covenant;<sup>40</sup> their "members have only been endowed with specific rights designed to secure the existence and survival of the community concerned,"<sup>41</sup> and not with any right of self-determination or autonomy.

At the working group's first session, Brazil continued in this vein by arguing forcefully for the "protection" and gradual "integration" of Indians. At the second session, Brazil suggested that indigenous autonomy was a form of racial discrimination that would invariably lead to oppression and injustice. At the heart of the Brazilian thesis was the belief that individual freedom can be realized only in multi-cultural states where different ethnic groups compete and counteract one another's prejudices through the majoritarian democratic process. "A group that was given an opportunity to participate in the life of [such] a State could not be said to have been denied the right to self-determination." The United States concurred that access to the electoral process in a multi-cultural democracy is all the self-determination that anyone needs.

Indigenous advocacy has gradually overcome this view. While "the just struggle of indigenous peoples is closely tied to the struggle of peasants for land and of workers for better living conditions" throughout the developing world, as Mexico explained at the working group's fourth session, most governments now agree with New Zealand that "policies and programmes which allow people to determine their place in society, and the place of their culture and traditions in that society," are preferable to assimilation. Some form of separate institutional existence for indigenous communities, albeit more or less within the framework of the territorial state, has become a relatively respectable concept. Even Brazil's ambassador was able to concede

<sup>39</sup> See, e.g., the Committee's discussion of Brazil, paras. 253-255 of its 1983 report, 38 UN GAOR Supp. (No. 18), UN Doc. A/38/18 (1983), and of Ecuador in paras. 206 and 210 of its 1982 report, 37 UN GAOR Supp. (No. 18), UN Doc. A/37/18 (1982).

<sup>40</sup> See, e.g., the discussion of Indian self-government in Canada's most recent periodic report, UN Doc. CCPR/C/1/Add.62, at 94 (1983).

<sup>41</sup> UN Doc. CCPR/C/SR.590 (1985) (discussion of draft general comment). Interestingly, however, the Committee noted the use of the phrase "aboriginal peoples" in Canada's Constitution Act 1982, §35 (sched. B of UK Canada Act 1982, ch. 11), and "asked whether [this] did not cast a new light on the applicability of Article 1 of the Covenant." UN Doc. CCPR/C/25/CRP.1/Add.6 (1985).

the principle of indigenous autonomy, short of independence, at the working group's fourth session, and only Argentina was still describing the legislation regarding its Indian groups in terms of "facilitat[ing] their social integration and development."

General agreement has also developed on the need for a special instrument that goes beyond existing legal standards. "Experience has shown that the special problems facing indigenous populations cannot be adequately solved by existing international norms of human rights," Norway told the working group's fourth session. "There is a clear need for a new set of norms in this area," beginning with a declaration, and "possibly followed by a convention." Canada concurred: "We see aboriginal rights as something extra that our aboriginal peoples enjoy flowing from original occupancy"; thus, any new instrument must "go beyond fundamental rights" and focus on "special needs and rights."<sup>42</sup> Argentina similarly called for "a more systematic implementation of existing human rights instruments, as well as complementary international agreements yet to be made." Australia supported the concern of indigenous observers that special rights not mean lesser rights, and it urged the working group to "harmonize with and build upon fundamental human rights set out in [existing] instruments."

Governmental observers, however, continued to stress that the circumstances and aspirations of indigenous communities "can differ considerably from country to country," as Australia told the Commission in 1982. New Zealand made the same point at the working group's fourth session and warned that "a very careful focus indeed is necessary to translate wider standards into effective local practice." "If it is to be a truly international instrument," Canada agreed, a declaration "must have relevance to all indigenous groups throughout the world," taking account of "differing historical backgrounds and differing relationships with governments." This meant dealing only with "the most fundamental rights," rather than attempting to cover every possible problem. Argentina and Mexico echoed this concern for "differences in national realities."

The working group has come to accept that both governments and indigenous organizations expect "progress," as Chinese member Gu Yijie observed at the fourth session. Kwesi Simpson of Ghana agreed that "[a] general consensus is now emerging that the time has come for concrete action to begin," including "some preliminary draft . . . ideas and concepts that might eventually be incorporated into a Declaration." Although a declaration might eventually lead to a convention, Simpson suggested that the working group "draw inspiration from the influence which the Declaration on the Granting of Independence to Colonial Countries has had on the decolonization process." "Thanks to this Declaration," he said, "millions of people the world over now live in freedom and independence. Similarly I believe that the liberation of and the restoration of basic rights to indigenous populations

<sup>42</sup> For this reason, the phraseology "indigenous rights" has been preferred over "human rights of indigenous populations" in most recent resolutions, e.g., Sub-Comm'n Res. 1985/22 (Aug. 29).

and peoples will be hastened if we succeed in drawing up an appropriate declaration." A declaration alone, if well crafted and supported by governments, could achieve as much as a binding instrument.

There were words of caution as well. Canada warned that "[o]verly ambitious targets could jeopardize the early acceptance by the international community of a document which must reflect the circumstances and needs of all concerned." Most governments, however, were satisfied with assurances that they would be invited to comment at each step in the drafting process. Indeed, from the outset Asian and Latin American governments have objected more to the fact-finding than the standard-setting side of the working group's mandate. Brazil tried to persuade the Commission in 1982 that governments' efforts would be "more legitimately employed in trying to solve problems of indigenous populations" than in making reports to UN bodies. At the second session of the working group, Chairman Eide promised governments that it would not be allowed to become a "chamber of complaints." "The role of the Working Group is not to pass judgment," he explained, "but to understand the problems of indigenous populations so as to develop standards for their protection."

Some governments nonetheless considered Eide too liberal in admitting the statements of indigenous representatives, and he was not reelected to the Sub-Commission in 1984. Although his Greek successor, Erica-Irene Daes, has been perceived as stricter, at least by indigenous organizations, Bangladesh and Sri Lanka were warning the working group's fourth session to ignore those who were trying to "divert it from its basic purpose" of evolving standards by leveling specific allegations. At the same time, Toševski adamantly opposed standard setting, which some diplomats perceived as a sign of the Eastern European group's unhappiness that less time was being spent on problems of specific countries. After all, most indigenous delegations have come from the Americas. As long as the working group devoted itself to facts rather than universal standards, its sessions embarrassed the West without threatening the East. The balance has now shifted.

### *The Content of Indigenous Rights*

Although the working group planned to devote its third session in 1984 to land rights,<sup>43</sup> few governments were prepared to deal with specifics, and only one indigenous organization drew up a concrete proposal.<sup>44</sup> On the governmental level, Australia announced plans to give aboriginal communities "inalienable freehold title" to traditional and sacred lands, with a veto

<sup>43</sup> At the second session in 1983, the working group adopted a "plan of action" calling for a discussion of land rights and definition in 1984, and listing eight other "preliminary priorities" for subsequent sessions, including "autonomy and self-determination." UN Doc. E/CN.4/Sub.2/1983/22, Ann. I. At the third session, it decided to proceed to culture, language, religion and education. UN Doc. E/CN.4/Sub.2/1984/22, Ann. I. The rights to "autonomy, self-government and self-determination," and problems of health and housing are the topics for 1986. UN Doc. E/CN.4/Sub.2/1984/22, Ann. I.

<sup>44</sup> UN Doc. E/CN.4/Sub.2/AC.4/1984/NGO/1 (Four Directions Council).

over development;<sup>45</sup> and Canada described its ongoing land claims process, emphasizing its view that settlements must be negotiated, "not imposed unilaterally." An NGO, the Inuit Circumpolar Conference, stressed the importance of recognizing indigenous land tenure systems, but there was no response from governments. In the end, indigenous representatives jointly submitted a proposal that

the Working Group recogniz[e], as did the World Conference to Combat Racism and Racial Discrimination of 1978, "the special relationship of indigenous peoples to their land and . . . that their land, land rights and natural resources should not be taken away from them." Discovery, conquest, and unilateral legislation are not legitimate bases for states to claim or retain the territories or natural resources of indigenous peoples. In no circumstances should indigenous peoples or groups be subjected to adverse discrimination with respect to their rights or claims to land, property, or natural resources.<sup>45a</sup>

The working group simply annexed this text, without comment, to its report.

Considering it necessary to force substantive debate, indigenous organizations placed two complete draft declarations before the fourth session, one prepared by the World Council of Indigenous Peoples, and the other representing a consensus of six other indigenous NGOs as well as 16 additional indigenous organizations in the Americas and Australasia.<sup>46</sup> The most provocative provisions of the latter draft referred to land and self-determination:

2. All indigenous nations and peoples have the right to self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they choose. . . .

3. No State shall assert any jurisdiction over an indigenous nation or people, or its territory, except in accordance with the freely expressed wishes of the nation or people concerned.

4. Indigenous nations and peoples are entitled to the permanent control and enjoyment of their aboriginal ancestral-historical territories. . . .

5. Rights to share and use land, subject to the underlying and inalienable title of the indigenous nation or people, may be granted by their free and informed consent, as evidenced in a valid treaty or agreement.

6. Discovery, conquest, settlement on a theory of *terra nullius* and unilateral legislation are never legitimate bases for States to claim or retain the territories of indigenous nations or peoples.

<sup>45</sup> At the working group's fourth session, aboriginal observers accused Australia of reneging on this commitment, on the basis of statements of the Government's responsible minister that questioned the practicability of recognizing an aboriginal veto over mining. Australia assured the working group that the matter was still under review.

<sup>45a</sup> UN Doc. E/CN.4/Sub.2/AC.4/1984/WP.1.

<sup>46</sup> The drafts are reproduced in Annexes III and IV of the report of the fourth session, UN Doc. E/CN.4/Sub.2/1985/22. The second draft grew out of a meeting of indigenous organizations at Geneva in July 1985, convened in part to discuss the first.

7. In cases where lands taken in violation of these principles have already been settled, the indigenous nation or people concerned is entitled to immediate restitution, including compensation for the loss of use, without extinction of original title.

In addition, the draft declaration called for the recognition of various cultural rights, including:

12. Indigenous nations and peoples have the right to be educated and conduct business with States in their own languages, and to establish their own educational institutions.

14. The religious practices of indigenous nations and peoples shall be fully respected and protected by the laws of States and by international law. Indigenous nations and peoples shall always enjoy unrestricted access to, and enjoyment of sacred sites in accordance with their own laws and customs, including the right of privacy.

Cultural rights evoked little controversy. Argentina, for example, accepted that indigenous peoples place importance on the "preservation of their cultural identity through the practice of their traditions, and through the use of, and education in their own languages," and made a commitment to include indigenous content in the education of all Argentinians. New Zealand advocated the "promoti[on of] multiculturalism" through the incorporation of indigenous content in all public education, and it announced plans to make Maori an official language as well as an optional language at all educational levels. Canada asserted that the education of indigenous children should be "locally controlled and linguistically and culturally appropriate," as part of a larger policy of "ensuring that indigenous populations have control, and influence, over their own cultural and educational activities." Endorsing "bilingual-bicultural" education, Mexico called for more than "simply declarations of good intentions but real policies and programmes, with the active participation of the indigenous peoples themselves."

The fourth session also paid considerable attention to land. The Government of Argentina candidly described the loss by the Indians of their land and their lack of legal title to what they still occupied, and committed itself to recognizing and restoring ownership to them "in accordance with their own organization and customs." Land would be restored out of public holdings where possible, and out of private holdings if necessary; and in the future, communities would not be relocated without their consent and compensation. Mexico admitted to the same problems, and while emphasizing the need for land reform, it warned against development programs that "result in policies actually recognizable as ethnocide." This comment seemed to anticipate the subsequent efforts of Indonesia, Bangladesh and Sri Lanka to defend their transmigration programs as beneficial to all segments of society through the redistribution of surplus land and labor.

Governmental observers showed more caution about collective political rights. "A guiding principle," observed Norway, "should be that the indigenous peoples should have influence in the decision making process concerning their own affairs." Australia and New Zealand described their policies

of encouraging local and regional consultative meetings. Canada reiterated its previous commitments to "establishing self-government structures at the local level" through negotiations, and its agreement in principle with the proposal for a separate Inuit "public government" in the Arctic. The trend towards more local indigenous control of public funds, "[w]hile falling far short of self-determination," was commended by Canada as a way of giving communities "an ever-increasing control over their own affairs."

Attending a session of the working group for the first time, the Holy See referred to "the right of indigenous peoples to a territorial, cultural, economic as well as political environment in which they can develop their own way of life" as "members of the community of nations." Rome's observer stressed in particular Pope John Paul II's January 1985 statement at Latacunga, where he characterized the right "to be able to determine the form of government of your communities" as a "legitimate aspiration," and his September 1984 speech to Canadian natives at Fort Simpson, in which he emphasized "self-determination in your own lives as native peoples," the right "to develop your lands and economic potential, to educate your children, and to plan your future."

Anticipating Latin American arguments that tribal governments would be backward, the observer for the Holy See added that "to preserve their own identity does not mean wanting to remain rooted passively in the past, or in institutions wholly unsuited for modern times." He was confident that indigenous peoples would be motivated "by the spirit of openmindedness and progress." Mexico continued in this vein by stating that "indigenous cultures are dynamic forces in continuous transformation." "The challenge," Canada concluded, "is to enable indigenous populations to benefit from change but still preserve their essential values." The United States, however, made a point of insisting that a declaration stress the responsibility of indigenous governments to respect the human rights of all persons within their jurisdiction.

As for the members of the working group, Alfonso Martínez and Simpson identified life, land, self-determination and cultural rights as appropriate subjects for a declaration. Gu Yijie conceived of the declaration as three-tiered, beginning with the right to nondiscrimination under existing instruments such as the Convention on the Elimination of All Forms of Racial Discrimination. Next, the "right [of indigenous populations] to the land must be protected" because it "is an imperative for their life." Finally, they must have the right to "appropriate political self-rule," at least to the extent officially recognized for ethnic minorities in China. Significantly, she made a connection between land rights and Article 25 of the Covenant on Economic, Social and Cultural Rights, which refers to "the inherent right of all *peoples* to enjoy and utilize fully and freely their natural wealth and resources" (emphasis added).

After the close of the public session, the working group met privately several times to consider how to proceed. At least one member was prepared to draft a complete declaration to serve as a working document; another remained opposed to drafting anything at all. As a compromise, they con-

sidered only a few relatively "non-controversial" principles and drafted them in a deliberately preliminary manner:<sup>47</sup>

1. The right to the full and effective enjoyment of the fundamental rights and freedoms universally recognized in existing international instruments, particularly in the Charter of the United Nations and the International Bill of Human Rights.<sup>48</sup>

2. The right to be free and equal to all other human beings in dignity and rights, and to be free from discrimination of any kind.<sup>49</sup>

3. The collective right to exist and to be protected against genocide, as well as the individual right to life, physical integrity, liberty, and security of person.

4. The right to manifest, teach, practice and observe their own religious traditions and ceremonies, and to maintain, protect, and have access to [sacred] sites for these purposes.<sup>50</sup>

5. The right to all forms of education, including the right to have access to education in their own languages, and to establish their own educational institutions.

6. The right to preserve their cultural identity and traditions, and to pursue their own cultural development.

7. The right to promote intercultural information and education, recognizing the dignity and diversity of their cultures.<sup>51</sup>

Governmental observers from Australia, New Zealand, Canada, the United States, Norway and Argentina praised this progress privately at the subsequent session of the Sub-Commission.<sup>52</sup>

### *The Growth of Indigenous Advocacy*

Ordinarily, only organizations with consultative status (NGOs) may participate in meetings of the Economic and Social Council and its subsidiary bodies. The Working Group on Indigenous Populations is unique in having opened its doors to indigenous groups regardless of their formal status with ECOSOC. This procedural policy, adopted at the first session of the working group in 1982, has made its annual meeting one of the most popular and

<sup>47</sup> UN Doc. E/CN.4/Sub.2/1985/22, Ann. II. The Yugoslav member did not attend the drafting meetings.

<sup>48</sup> Compare the text of the indigenous organizations' proposal: "In addition to these rights, indigenous nations and peoples are entitled to the enjoyment of all the human rights and fundamental freedoms enumerated in the International Bill of Rights and other United Nations instruments. In no case shall they be subjected to adverse discrimination."

<sup>49</sup> The indigenous proposal read: "Indigenous nations and peoples have, in common with all humanity, the right to life, and to freedom from oppression, discrimination, and aggression."

<sup>50</sup> Compare the indigenous text, para. 14 at p. 381 *supra*.

<sup>51</sup> Compare Article 7 of the Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, *reprinted in* 5 ILM 352 (1966).

<sup>52</sup> Owing to delays in issuing the working group's report and lack of time, there was no public debate, but these Governments' views were discussed with each other and with members of the working group.



well-attended human rights activities at Geneva: in 1985 it attracted more than 150 participants, including indigenous representatives of 40 organizations in 18 states. Although at first some governments were reluctant to accept this arrangement, at the fourth session in 1985 many welcomed the initiative taken by indigenous organizations in proposing draft declarations of principles. "During the past decade we have witnessed an increasing will and ability of indigenous groups to coordinate their views and formulate common policies," the Norwegian observer noted. "My government welcomes this development, and holds the view that [this] should be encouraged." Indigenous groups had "taken a serious and constructive approach and have presented concrete proposals for our consideration," the United States said, adding that the proposals "represent an expression of the aspirations of indigenous peoples and a prioritizing of the rights which they hold most important." "Such expressions are useful not only to the Working Group, but also to concerned governments, since they increase our understanding of the unique perspective of indigenous peoples and the actions which they seek from governments and the international community." Even Bangladesh praised the working group's "flexible methods of work," a code phrase for the admission of indigenous observers regardless of NGO status.

On the other hand, for the first time there were allegations of interference with indigenous representatives traveling to Geneva. Three Sri Lankan Veddahs hoping to attend the fourth session reportedly were denied passports, and indigenous NGOs asked the working group, unsuccessfully, to express concern to the Sri Lankan Government. Sri Lanka nonetheless felt obliged to explain and told the working group that there had simply been insufficient time to complete the necessary formalities. Moreover, bringing the Veddahs to Geneva was part of a "reckless" attack; "these innocent people" were to be "exhibit[ed] in a most disgraceful manner before your Working Group." This incident calls into question the working group's ability to assure a truly representative inquiry and highlights the potential future significance of the Voluntary Fund as a means of providing quasi-diplomatic shielding for indigenous representatives from sensitive regions to whom the fund has given travel assistance.

In the meantime, indigenous advocacy is expanding into related fields of human rights law. Interventions on cultural rights were made at the 1985 session of the Commission's Working Group on the Draft Convention on the Rights of the Child, with a view towards adoption of an additional article,<sup>53</sup> and in support of the Sub-Commission's special rapporteur on religious intolerance, to emphasize the protection of sacred sites.<sup>54</sup> At the 1985

<sup>53</sup> UN Doc. E/CN.4/1985/WG.1/NGO.1; UN Doc. E/CN.4/1985/WG.1/WP.3.

<sup>54</sup> See, e.g., UN Docs. E/CN.4/1984/SR.56 (Four Directions Council), and E/CN.4/Sub.2/1984/SR.33 (Four Directions Council). Indigenous groups also participated in the Seminar on the Encouragement of Understanding, Tolerance and Respect in Matters relating to Religion or Belief, held at Geneva in 1984, UN Doc. ST/HR/SER.A/16 (1984).

session of the Sub-Commission, indigenous observers took an active part in debates on genocide, the definition of minorities and the rights of disabled persons.<sup>55</sup> This activity amounts to more than indigenism. Indigenous organizations are emerging as a kind of regional group with broad interests, which seems likely to enhance both their credibility and the force of their claims to a degree of political responsibility.

RUSSEL LAWRENCE BARSH\*

#### RECOMMENDATION ON MINIMUM INTERNATIONAL LABOR STANDARDS

In 1984, under the chairmanship of Professor Louis J. Emmerij, a working group of the Netherlands National Advisory Council for Development Cooperation drafted a report on minimum international labor standards. The report was approved by the Council late that year and was subsequently presented to the Minister for Development Cooperation.

The report considers the desirability of incorporating certain minimum international labor standards into international agreements on economic cooperation and trade policy that involve developing countries. After reviewing the various arguments for and against such incorporation, the report finds that the debate remains inconclusive. However, supporters and opponents both agree on the need to fight protectionism and promote improved working conditions in developing countries. Therefore, an effort is made to identify a number of labor standards whose violation or nonapplication would strongly imply that the basic need for freely chosen work in humane conditions could not be satisfied; it is those standards that ought to be applied in all countries and all economic sectors.

By applying three different types of criteria (social, legal and economic) to existing ILO Conventions, the so-called minimum package of international labor standards was identified. This package consists of the following standards: freedom of association (No. 87), the right to engage in collective bargaining (No. 98), equal remuneration (No. 100), abolition of forced labor

<sup>55</sup> See, e.g., UN Docs. E/CN.4/Sub.2/1985/SR.11 (Four Directions Council), E/CN.4/Sub.2/1985/SR.15 (World Council of Indigenous Peoples and Four Directions Council), and E/CN.4/Sub.2/1985/SR.23 (Four Directions Council).

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Most of the statements quoted in the text are taken from government observers' speaking notes and audiotape transcripts, copies of which may be obtained from the author.

(No. 105), prohibition of discrimination (No. 111), (full) employment policy (No. 122) and minimum age (No. 138).

The report then observes that, under certain conditions, the effectiveness of these standards can be enhanced by including a provision concerning their observance in international agreements involving developing countries, and it examines the feasibility of using GATT, the Lomé Convention and other vehicles for this purpose. While GATT might in principle be suitable, the report concludes that at present using GATT would not be feasible; it sees more promise in using the institutions of the Lomé Convention.

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## BOOK REVIEWS AND NOTES

EDITED BY DETLEV VAGTS

*Universelles Völkerrecht: Theorie und Praxis* (3d ed.). By Alfred Verdross and Bruno Simma. Berlin: Duncker & Humblot, 1984. Pp. xxx, 956. Index. DM 68.

The first edition of the present treatise appeared in 1976, the second one, which was an unaltered reprint, in 1981. The present edition is a completely revised and considerably enlarged version. In spite of its 956 pages (compared with 687 in the first edition) it has a remarkably low price (DM 68), probably unrivaled by that of any other treatise of the same size and quality, and this without any decrease in the quality of the print or the paper. The changes and additions that Alfred Verdross had prepared before his death in 1980 are included in this edition, but the greatest part of the additional material was contributed by Bruno Simma.

The structure of the book remains unaltered. It starts from the premise that it is no longer possible to make a distinction between general international law and the particular law of the United Nations, as Verdross had done in an earlier treatise. Because the United Nations has become almost universal and its leading principles are recognized by nonmembers as well as members, the UN Charter is considered the constitution of the universal community of nations, whereas the preexisting general international law is built into the framework created by the Charter. The book's structure reflects this reasoning. After an introductory first part on the "Concept, Evolution and Nature of International Law," the second part deals with the "Constitutional Principles of the Community of Nations" and gives mainly a description and evaluation of the structure and functions of the United Nations and its specialized agencies. The third and largest part is devoted to general international law and is traditionally arranged. It bears the heading "The Reception of the Norms of Classical International Law by the Charter of the United Nations and their Further Development." Although one has become accustomed to this wording since the first edition appeared, it is not an easily understandable title for anyone who uses the book for the first time, nor does it entirely correspond to the questions dealt with in this part, as the words "reception" and "development" allude more to questions of procedure than to the content of general international law. Apart from this terminological question, however, the structure of the book is perfectly logical and has the great advantage of bringing the whole corpus of present-day international law into one coherent system.

The enlargement of the book is due mainly to the development of international law since 1976. All relevant new conventions and resolutions, judicial decisions and state practice are taken into consideration, as are practically

all new publications in the field of international law written in German, English, French and Italian. The book in this way has been brought up-to-date in every respect. Some subjects were revised with particular thoroughness. Thus, the new UN Convention on the Law of the Sea of 1982 receives excellent and concise treatment in approximately 70 pages (on which the author had the collaboration of Renate Platzöder and Bernd Rüster). In the section on state succession, the two relevant Vienna Conventions of 1978 and 1983 are critically examined. Further sections completed with particular devotion concern liberation movements, multinational enterprises, intervention in civil wars, the "New International Economic Order," intertemporal law, "soft" law, the protection of the environment, state immunity, extraterritorial effects of national legislation, reprisals and human rights. As in the first edition, the law of war and neutrality has been left aside, but its inclusion is promised for the next edition. It seems questionable whether this can be done without dividing the book into two volumes.

The new edition retains all the monumental qualities that had already been observed in the first edition. In hardly any other textbook on international law is such a wealth of knowledge and materials made accessible in so little space and analyzed with such depth and clarity. The book is one of the most useful tools for any scholar or practitioner. The preface announces that an English translation will appear in the foreseeable future.

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*Essays in International Law in Honour of Judge Manfred Lachs.* Edited by Jerzy Makarczyk. The Hague, Boston, Lancaster: Martinus Nijhoff Publishers, 1984. Pp. 757.

Judge Lachs, now in his third term as a member of the International Court of Justice, has been honored by 50 colleagues from around the world on the occasion of his 70th birthday with a monumental collection of essays published by the Institute of State and Law of the Polish Academy of Sciences. The volume is edited by the present director of the institute and elegantly introduced by the previous director and now Minister in the Polish Government, Adam Łopatka.

Although four essays are treated as miscellaneous (H. Blix on arms control treaties and the environment, R. St. J. Macdonald on trade-related performance requirements and GATT, B. Röling on the law of arms control and disarmament, and A. Truyol y Serra on the 500th anniversary of Francisco de Vitoria), the remainder are grouped under the headings of international legal theory, the ICJ and the peaceful settlement of disputes, international organizations, and the law of the sea and outer space. Within each section the essays are grouped alphabetically by author, a scheme which regrettably means that certain complementary or juxtaposed essays do not follow one

another. Apart from a purely personal appreciation by Lord Elwyn-Jones, however, each makes its own contribution to the discipline.

In the realm of theory, some are concerned with the international order itself (S. Bastid on the ambitions and limits of the international legal order, A. El-Khani on diplomacy, G. de Lacharrière on negotiating a more efficacious international law and K. Mbaye on the law of development in international law), some with codification and progressive development (C. Chaumont on the ambivalence of essential concepts of international law, S. E. Nahlik, N. A. Ouchakov, G. I. Tunkin, A. Wasilkowski and K. Wolfke) and some with the problems of theory and practice. In the latter grouping, Maxwell Cohen examines international legal influence upon the Canadian Charter of Rights and Freedoms, Ronald Graveson explores the contributions of private international law and comparative law to international harmony, R. Y. Jennings revives and reinforces Georg Schwarzenberger's original thesis on the dangers of identifying international legal doctrine with international law itself, and E. McWhinney is instructive on the temporal aspect of international law. Two contributors (J. Barboza and J. J. A. Salmon) discuss necessity in international law, and several explore the law of treaties (K. Zemanek on reservations, M. Virally on resolutions of international organizations and J. Jodłowski on treaties in Polish Supreme Court practice). G. Sperduti considers aspects of state responsibility.

Two contributors dwell on Lachs's philosophy as expressed in his judgments. P. de Visscher combines delicate and subtle analysis with careful selective quotations from the majority opinion in the *Nuclear Test Ban* case to leave little doubt in the mind of the informed reader that Lachs must have drafted the opinion. L. V. Prott was unpersuaded of that but offers a wider view of Lachs's role on the ICJ over two decades. Judge Elias writes on advisory opinions in the ICJ and Judge Mosler on agreed areas of justiciability in certain ICJ cases. G. Morelli discusses the functions and objects of intervening in international proceedings. B. Broms and M. Šahović discuss the Manila Declaration on the peaceful settlement of disputes, R. Monaco considers international declaratory judgments and G. Geamănu, the role of negotiations as the principal means of peacefully settling international disputes.

Most of the essays on international organizations are concerned with the United Nations. T. Franck and Judge Schwebel each write about the Secretary-General, and W. D. Verwey is interested in "grey zones" of international law that have come to light through UN treatment of the problems of less-developed countries. H. Bokor-Szegö pursues the influence of universal international organizations on the domestic legal orders of member states, J. Kolasa pursues the distinction between a resolution and a decision of an international organization, and the editor of the volume examines ICJ pronouncements on the implied powers of international organizations. Y. Yokota offers an interesting essay on the applicability of the notion of the international public corporation to certain international organizations but weakens his argument by overlooking some of the most plausible candidates: the international economic organizations of socialist countries.

The law of the sea and the law of outer space have been two of Judge Lachs's favorite branches of international law and, not surprisingly, eight contributors chose to dwell on them. R. Bierzanek combines the two by examining state frontiers and space beyond state sovereignty. Five contributors treat the 1982 Convention on the Law of the Sea (Judge Jiménez de Aréchaga on customary international law and the Convention, J. Castañeda on the exclusive economic zone, E. J. Manner and Judge Oda on dispute settlement, and D. Vignes on the development of conference conceptions of the sea). Judge Nagendra Singh writes on the maritime flag and state responsibility, and V. S. Vereshchetin on prohibiting the use of outer space for military purposes.

The catholicity of essays and especially of the contributors, from all parts of the globe and representing all types of international lawyer—judge, teacher, legal adviser, diplomat and research scholar—make this an especially attractive collection of its genre and a splendid tribute to one of the most accomplished international lawyers representing the socialist countries on the International Court of Justice.

W. E. BUTLER

*University College London*

*Chinese Yearbook of International Law and Affairs*. Vol. 3 (1983). Edited by Hungdah Chiu. Taipei: Chinese Society of International Law—Chinese (Taiwan) Branch of the International Law Association, 1984. Pp. 347. Indexes. \$12.

The earlier two volumes of this publication have already been reviewed in this *Journal*.<sup>1</sup> The present volume covers the period from January to December 1983, except for the information concerning contemporary practice, judicial decisions and U.S.-Republic of China trade, which the editor takes to the summer of 1984.

Little novelty is displayed in the two scholarly articles. The first article, *Some Problems Concerning the Delimitation of the Maritime Boundary between the Republic of China and the Philippines*, by H. Chiu, was previously published elsewhere, and the second, on the historical aspect of Chinese immigration to the United States in the period 1868–1894, by M. A. Ryan, does not have contemporary relevance.

The remainder of the *Yearbook* consists of a summary of recent legal developments in U.S.-Republic of China trade, of which the antidumping cases appear to be the most interesting and have the widest import (pp. 70–80); an overview of the legislation on and constitutional interpretations of human rights in the Republic of China (some of this legislation deals more with the environment than with civil liberties, e.g., the Water Pollution Control Act (pp. 94–95) and the Noise Control Act (p. 96)); a selection of recent foreign cases and legal opinions concerning the Republic of China, including the

<sup>1</sup> See Leng, 77 AJIL 975 (1983) and 79 AJIL 269 (1985).

debates in the U.S. Congress on the Taiwan Enabling Act, which are faithfully reported at length (pp. 121-46); a summary of the contemporary practice and judicial decisions of the Republic of China relating to international law; book reviews; article summaries; a catalog of bilateral treaties and agreements concluded by the Republic of China with other states and official, semi-official or unofficial agreements with countries with which it does not maintain diplomatic relations; addresses of the Republic of China's diplomatic, consular, official, semi-official or unofficial missions abroad and the names of their counterparts in the Republic of China; and a bibliography. This book strangely combines the dual functions of a learned academic journal with a foreign relations handbook of the Republic of China. It is in the second respect that it differs from yearbooks of other countries, which serve solely the scholastic function.

FRANKIE FOOK-LUN LEUNG  
*University of Hong Kong*

*Netherlands Yearbook of International Law*. Vol. XV, 1984. Published jointly with the *Netherlands International Law Review* and under the auspices of the T.M.C. Asser Instituut, The Hague. The Hague: Martinus Nijhoff Publishers, 1984. Pp. 585. Index. Dfl.120; \$48.

Maintaining its customary format, this valuable yearbook contains leading articles, as well as documentation, covering Netherlands state practice, treaties, municipal legislation affecting international law, court decisions and scholarly literature. This year the articles are of particular timeliness and interest. Wil D. Verwey and Nico J. Schrijver treat the taking of foreign property. H. W. A. Thirlway, an official of the Registry of the International Court of Justice, contributes a careful analysis of the provisions regarding "reciprocity" with respect to the Court's jurisdiction under Article 36 of its Statute. (An issue of this nature arose during the course of the pending *Nicaragua v. United States* case.) A. Th. S. Leenen discusses extraterritorial application of the antitrust law of the European Economic Community. Paul Peters, Alfred H. A. Soons and Lucie A. Zima write about the removal of obsolete installations in the exclusive economic zone under Article 60(3) of the 1982 UN Convention on the Law of the Sea. H. G. de Jong comments on coercion in the conclusion of treaties.

Some other items of interest covered by the *Yearbook* include the following. A statement by the Minister for Development Cooperation appears under state practice, in which he disapproves of claims for refugee status based upon poverty in the fugitive's home country or in the country of original asylum (p. 293). It is the position of the Dutch Government that although a foreign diplomat may enjoy constitutional freedom of speech, his public expression of views may nevertheless amount to interference in the internal affairs of the receiving state and render him *persona non grata* (p. 308). Likewise, if a receiving state has grounds for believing that the diplomatic bag is being used to import illegal items, it may require opening of the bag



in the presence of a representative of the sending state; and in case of refusal, it may return the bag to its place of origin (p. 310). And the treaty right of a diplomatic mission to protect the interests of nationals does not give to such nationals a legal right to demand that their own government extend diplomatic protection to them (p. 344). A bill was sponsored by the Dutch Government to enact legislation authorizing enforcement of arbitral awards made by the Iran-U.S. Claims Tribunal (pp. 352-55). Noteworthy amendments to the Dutch Constitution took effect on February 17, 1983, affecting fundamental rights, admission and expulsion of aliens, extradition, Netherlands nationality, residency, external relations and the possibility of voting by foreigners and their serving on local government bodies (p. 417).

Under judicial decisions should be noted a lengthy abstract (pp. 471-84) of a ruling by the Rotterdam district court requiring Alsatian potash mines polluting the Rhine to compensate downstream Dutch nursery garden owners for damages sustained through violation of the standard of care due joint users of the river under the maxim *sic utere tuo ut alienum non laedas*.

EDWARD DUMBAULD  
Senior U.S. District Judge

*Polish Yearbook of International Law*, Vol. XI, 1981-1982. Warsaw: Polish Academy of Sciences, Institute of State and Law, 1984. Pp. 331. Zł. 260.

*Polish Yearbook of International Law*, Vol. XII, 1983. Warsaw: Polish Academy of Sciences, Institute of State and Law, 1984. Pp. 308. Zł. 210.

The volumes of the *Polish Yearbook of International Law* reviewed here follow the pattern well established in previous years. After articles of substance come Polish Supreme Court decisions in international civil law cases, followed by awards of the Court of Arbitration at the Chamber of Foreign Trade in Warsaw, book reviews and the list of international treaties ratified or denounced by the Council of State (the equivalent of the Soviet Presidium of the Supreme Soviet) or approved by the Council of Ministers. In this category belong political treaties, those which differ from or change provisions of the law in force and those which require ratification because of the law of the partner to the treaty. Administrative agreements (departmental) are not included. The final item is a bibliography of articles and books published in Poland (public and private international law) in the years 1978-1981.

The articles of substance in both volumes are almost invariably directly or indirectly connected with events that influence the policy of the state. The Helsinki Accords, the responsibility of states and the Rules on the Establishment of International Organizations adopted in 1976 by the Council for Mutual Economic Assistance inspired individual contributors. Michalska writes on the codification of human rights under UN auspices, noting the shift from individual rights to collectivized or socialized rights. Symonides contributes an article on the security of the Polish western frontiers, and links the Polish-German normalization treaties of 1970 to the Helsinki Ac-

cords. Finally, Frankowska's piece deals with the legal nature of the Helsinki Final Act adopted in 1975. The responsibility of states or international organizations for wrongful acts and of states for the activities of the mass media and direct broadcasting are covered in the articles by Bierzanek, Butkiewicz and Wiewiórowska.

An excellent article by Jakubowski on the rules of 1976 for the establishment of international enterprises as a means of realizing the integration plans of the socialist economies, and by Jasudowicz on the marine environment and pollution thematically link the contents of volume XI to the contents of volume XII. Last, an article by Renata Sonnenfeld deals competently with the power of international organizations to make treaties, an issue of singular importance in the current international situation.

The studies contained in volume XII concentrate on two issues: the international economic order and the law of the sea. The volume opens with an important article by Cakus on the conceptions of the international economic order in the classics of international law up to the beginning of the 20th century. Makarczyk and Wasilkowski continue on that theme with a study of the "New International Economic Order" as a means of transformation of international law in our time. Then attention is shifted to more practical aspects of the present international economic system. De Fiumel, a well-established authority in this area, discusses the treaty-making power of the EEC. Gilas contributes an interesting and enlightening article on compensation currency, while Rajski deals with the evolution of international commercial law in socialist countries. Poczobut and Wiśniewski, and Burzyński contribute two articles on East-West economic cooperation.

A series of articles on the law of the sea opens with Symonides's *Poland and the New Law of the Sea*, which describes Poland's positions vis-à-vis the emerging new order of the oceans. The article ends with an appeal addressed to the states that refused to sign and to join the Convention. Symonides argues that should these states (the United States and the industrialized states) refuse to join, the finances of the future International Sea-Bed Authority will be jeopardized. Góralczyk's article on the Sea-Bed Authority immediately follows.

In addition to these two groups of studies, Witold Daniłowicz, a Polish-American scholar, writes on the relations between the international and domestic legal systems in the jurisprudence of the ICJ. Renata Szafarz's piece is devoted to the succession of states in respect of treaties. Finally, Jan Kolasa writes a learned article on the concept of the international organization.

The author of the present lines would like to draw the attention of the reader to two articles by Sośniak on private international law (both in French), *Intertemporal Private International Law* (vol. XI) and *The Reach and Object of Polish Private International Law* (vol. XII). Sośniak argues that, in Poland, conflicts of jurisdiction are no longer within the compass of private international law. Similarly, uniform rules of law (codes of sales, conditions of delivery, etc.) belong to separate legal systems. Consequently, private international law as a system is limited to conflicts of law. Private international

law does not deal with the status of foreigners, the regulation of international relations (economic in the first place), international civil procedure or uniform law. Sośniak challenges the theoretical foundation of the Przybyłowski "school" of private international law, which follows a more traditional approach to the systematic order of private international law. In a sense, Sośniak's article reminds us of the Soviet theoretical discussions occasioned by the enactment of the Federal Law on the Principles of Civil Legislation in 1961; then, partisans of the unity of civil law and of the broader concept of private international law carried the day.<sup>1</sup>

K. GRZYBOWSKI  
Duke University

*Recueil des Cours de l'Académie de Droit International de La Haye, 1979. Vol. IV. (Vol. 165 of the collection.) The Hague, Boston, London: Martinus Nijhoff Publishers, 1981. Pp. 445.*

Half of this fourth volume of the Hague lectures of 1979<sup>1</sup> is devoted to the general course in public international law. The author, René-Jean Dupuy (Hague Curatorium, College of France), calls it *Communauté Internationale et Disparités de Développement*. It begins by dismissing the jurisprudential writings of earlier scholars and statesmen who emphasized consent as the basic lawmaking technique of the international legal order and the principal protection of national legal orders from the imposition of law by outsiders. Instead, Dupuy defines the international legal order as based on a "community" created by history, independently of consent, in which all states are equal members with relationships deriving from the facts of that hypothesized community. His intellectual debt to the writings of Georges Scelle, Wolfgang Friedmann, Paul Reuter and Charles De Visscher is fully acknowledged, and his dialectical approach to the analysis of the underlying process of community law formation is clearly explained.

Dupuy first considers the tension between the distribution of legal powers among states each acting in its own interest on the one hand, and the concentration of power in the community on the other. Within the world of international organizations, including the United Nations and its specialized agencies, the European Community and the Council of Europe, among others, each state's representatives also act in another capacity as participants in the particular affairs of an organization with its own powers and interests. This expansion of Scelle's notion of double functioning leads to a discussion of considerable depth and complexity, elaborating a theory of international institutions impossible to summarize fairly.

The model thus built is applied in a discussion of the role of multilateral treaties in institutionalizing vast areas of positive law. Dupuy sees the primacy of national discretion as leading to the expansion of national claims in the high seas, and ultimately to a dialectical reaction in UNCLOS III at which

<sup>1</sup> Cf. K. GRZYBOWSKI, SOVIET PRIVATE INTERNATIONAL LAW 82-84 (1965).

<sup>1</sup> The first three volumes are reviewed at 77 AJIL 353 (1983).

there was created a multinational institution to limit those claims and bring them under community control. The course, delivered in 1979, foresees the ultimate conclusion of UNCLOS III but not the resurgence of national interest, which has held back further institutional development. But the outline of the process clearly remains valid, and Dupuy's appreciation of the forces at work is consistent with the later history.

Turning to the dialectical opposition between "power" (*puissance*) and justice, the analysis continues first by attributing the evils of imperialism to amoral "positivism," as if naturalist jurists, like James Lorimer, had played no part in developing theories of "natural" racial dominance or historical necessity to justify imperial rule. The discussion does not seem to get past the obvious demonstration that legal equality does not reflect the many ways in which states are unequal, and that the inequalities influence the degree to which the legally equal states can participate in the full range of activities of concern to the international order. Following this naturalist approach, which minimizes the discretionary use of legal labels by states and tries to derive legal relationships directly from facts as if "facts" existed objectively and indisputable legal categories could be decided on the basis of "reason" alone, Dupuy devotes considerable effort to distinguishing between a "people" and a "state" and then finds in the international legal order that many "rights," such as rights to self-determination and to economic development, belong directly to "people." His primary evidences are UN General Assembly resolutions and other expressions of legal opinion formulated by "naturalist" jurists. He finds the Organization of African Unity's rejection of colonialism on the basis of peoples' rights to self-determination to be inconsistent with the same organization's insistence on maintaining colonial boundaries as the boundaries of the current states of Africa. On the other hand, he finds the balance between states in a legal world premised on competition, and the needs of people to survive economically, to be best handled not by appeals to principle, but by community acceptance of some obligations to cooperate in some economic matters contained in positive documents such as the Lomé Conventions of 1975 and 1979. By considering the moral documents, such as industry codes of conduct, as part of a legal continuum with treaty obligations, his model of the dialectical process and the process of community accommodation to the imperatives of "natural law" is laid out clearly. Of course, those taking a different jurisprudential view of things would give more weight than he to the actual rejection by the GATT of proposals for a generalized system of preferences, despite the escape left open for derogations from complete most-favored-nation treatment obligations to favor developing countries. But to argue about the point at which moral obligations, which new law permits to be discharged in derogation of older legal obligations, become legal obligations in their own right, in the absence of agreement, is to dispute Dupuy's jurisprudential orientation, which Dupuy has made entirely clear, and which is logically consistent. Such disputes are beyond discussion in a review.

A short section on the role of General Assembly resolutions and other "soft law" expressions in forming and revising customary international law completes the discussion of power and justice. Dupuy sees in the repeated

and negotiated consensual expressions of what the less-developed countries would like to be law a political process that is part of a lawmaking technique. But he is not carried away to the point of forgetting that reservations and statements of interpretation, as well as limitations on the actual lawmaking authority of the resolving or declaring organization, restrict the process. The balanced discussion is very persuasive.

In a final chapter, Dupuy returns to the underlying theme of state sovereignty versus community. He finds community law to be the dominant law in cases of conflict, and suggests that community law might include rules that states cannot avoid even by treaty: *jus cogens*. But whether the concept of *jus cogens* reflects the irreducible norms of the legal community, or is simply a political argument used essentially by weak states to assert the invalidity of treaties concluded under pressures of the powerful, which thus implies an inequality of "peoples" under the law, is unclear. Dupuy regards the concept as rather an example of the tension between community conceptions that fix limits on individuality and discretion, and the liberty of action that each state demands for itself. Similarly, Dupuy seems to doubt that the concept of "crime" as proposed by the International Law Commission formally in 1979 has any real applicability to cases of colonialism or aggression. Even in other cases, he regards the unavailability of community enforcement techniques that can be applied equally to all states as making the analogy to municipal criminal law, or some "natural law" concept of criminal law, seem strained.<sup>2</sup> The clearest example of the tension between states and the community as a whole, he suggests, might be in the law of the sea, where the search has been to reconcile the patrimony of mankind with the interests of the states into which mankind has divided itself.

In a concluding section, Dupuy argues eloquently that the institutions of the legal order, particularly the state, tend to obscure the fundamental applicability of human rights to individuals, and that the very notion of there being human rights is the moral basis for the entire legal order and the purpose of the community.

The lectures by Professor Andrea Giardina (Naples), *La Mise en Oeuvre au Niveau National des Arrêts et des Décisions Internationaux*, are on quite a different, but no less sophisticated, level. They are a descriptive analysis of the ways in which the decisions of international tribunals, from the majestic International Court of Justice to ad hoc arbitral tribunals charged to resolve the claims of nationals of one state against governmental activity of another, and including tribunals set up by international agreement to handle specific categories of cases such as the Court of Justice of the European Communities and the Centre for Settlement of International Investment Disputes, are translated (or not) into law enforceable by municipal legal process in the debtor or losing state. After an introductory chapter, the question is divided into four major parts: (1) the courts that are part of larger international institutions such as the ICJ, the European Communities Court and the Eu-

<sup>2</sup> See, for a very different analysis, Starace, *La Responsabilité Résultant de la Violation des Obligations à l'Égard de la Communauté Internationale*, 153 RECUEIL DES COURS 263 (1976 V), reviewed at 79 AJIL 251, 253 (1985).

ropean Court of Human Rights, and their institutional enforcement mechanisms; (2) tribunals intended to produce legal results directly within the municipal legal orders of states; (3) noninstitutional implementation of binding international decisions; and (4) implementation by national means. Some of the discussion is deeply insightful; for example, the analysis of the consistent institutional use of the ICJ's 1971 *Namibia* Advisory Opinion as contrasted with the way in which states ignore the institution in their actual contacts with South Africa concerning Namibia. Other lectures seem more descriptive than analytical. All are interesting and provoke much thought.

Finally, Georges Abi-Saab (Graduate Institute of International Studies, Geneva) lectured on *Wars of National Liberation in the Geneva Conventions and Protocols*. My own views in support of the application of the laws of war to "wars of national liberation" or even "terrorist" incidents at the lowest threshold, coupled with a rejection of the 1977 Geneva Protocols, are too well publicized for me to pretend to impartiality. Abi-Saab's basic argument is that the 1977 Protocols represent a great victory for justice in applying the law of war to such conflicts. In one place, Abi-Saab correctly states the principal argument against his thesis: that to give legal power even by international agreement to the "authority representing a people engaged" in a self-determination struggle when an equivalent legal power was not given to the identical authority engaged in a less "just" cause was to reintroduce "just war" concepts into what was most successful in the laws of war—the elimination of subjective determinations of "justice" from the definition of protections owing the innocent victims of the war. He then (p. 381) dismisses this objection on the ground that it "would have been convincing if its proponents were consistent and stood for the elimination of the distinction between international and non-international armed conflicts." But it seems hypocritical to reject a "convincing" argument because another and different argument that is to him not convincing is being made by some of its proponents.

There seem to be other problems. Abi-Saab's view of the "justness" of a self-determination struggle seems to rest not on moral suasion or historical evidence, but on the conclusion that "the principle of self-determination . . . is a legal principle" (p. 380), which flows from his construing the UN General Assembly as a legislative body. That construction in turn seems to flow from an assertion that since national parliaments are also political bodies, the objection that the General Assembly is a political body cannot overcome assertions that it can also legislate. Even if it is granted that General Assembly resolutions can play a role in the complex process by which general international law is "legislated," his conclusion seems too much. He might as well assert that a speech by a parliamentary leader is legislation and do away with voting and other constitutional problems.

In sum, this seems to be an able adversary brief for a point of view that in fact came to dominate the negotiation of the 1977 Geneva Protocols and, on closer analysis, seems more reason for rejecting than supporting them.

ALFRED P. RUBIN

*The Fletcher School of Law and Diplomacy*

*Die Europäische Menschenrechtskonvention in der Rechtsprechung der österreichischen Höchstgerichte.* Edited by Felix Ermacora, Manfred Nowak and Hannes Tretter. Vienna: Wilhelm Braumüller, 1983. Pp. 732. Index.

Over a period of almost three decades during which the European Convention on Human Rights has been part of the Austrian legal order, a rather extensive body of jurisprudence has evolved from the application of the Convention by the three highest Austrian courts. The present volume, which lists 11 contributing authors, presents the first systematic examination of this body of law covering the time span from the Convention's entry into force for Austria in 1958 to the middle of 1982. Three general introductory essays are followed by expositions of the application by the courts of Articles 2-16 of the Convention, as well as the substantive (rights) articles of the First and Fourth Additional Protocols. Each section dealing with a specific article (or articles, as in the case of the Fourth Protocol) features the text of the provision(s); a bibliography; an index of the pertinent decisions of the highest Austrian courts, and of select decisions of the European Commission, as well as the European Court of Human Rights; summaries of the Austrian decisions; and, finally, a commentary by the individual author.

The volume's subtitle, "A Manual of Theory and Practice," justifiably advertises the study's potential attractiveness to both academics and practitioners. Summaries and commentaries are concise without sacrificing the essentials. Although there are no cross-references to the jurisprudence of national courts of other states parties to the Convention, each of the review essays is otherwise well documented by references to the standard literature on the Convention and, of course, to the decisions handed down in Strasbourg. A detailed final index underscores the volume's value as a basic source of reference. From the practitioner's point of view, a loose-leaf format with the implied promise of future supplements might have rendered this study even more useful. But this is at most a minor blemish and is quite overshadowed by the value of the implicit sociological findings of the book. In many ways, it is a study of judicial resistance to legal change introduced by a conventional regime, some of whose features the courts have apparently resented as "alien" to Austrian public order and as representing legal standards whose further evolution through application is beyond the exclusive control of domestic courts. For many years after 1964, when the Austrian legislature expressly accorded constitutional rank to the conventional provisions and the courts finally abandoned the theory that the Convention as a whole was non-self-executing, they continued to deny or question the self-executing nature of such important provisions as Articles 6, 10, 11 and 13 of the Convention. To this day, in their application of the Convention, the highest Austrian courts frequently pay inappropriately little attention to the jurisprudence of the European Court and to the European Commission's practice. In a similar vein, conventional provisions are interpreted in a narrow grammatical fashion rather than teleologically, as would be warranted. This attitude towards the Convention and its Protocols is more than simply reflective of an ingrained notion of judicial self-restraint. It is evidence of a

certain parochialism that, unfortunately, remains well entrenched in the Austrian judiciary. It is thus not surprising that Austria has been the defendant in proceedings before the European Commission and the Court of Human Rights in significantly more cases than one would expect for a country with a population of its size.

GÜNTHER HANDL

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*Basic Bibliography of International Humanitarian Law.* Geneva: Henry Dunant Institute, 1985. Pp. vii, 106.

*Development of International Humanitarian Law.* By Géza Herczegh. Budapest: Akadémiai Kiadó, 1984. Pp. 239. \$21. Distributed by Humanities Press, Inc.

As noted in the foreword to the *Basic Bibliography*, one of the objectives of the Henry Dunant Institute in Geneva (the research and training center of the International Committee of the Red Cross) is to promote research and develop training and education in international humanitarian law applicable in armed conflict. As a contribution to this objective, the *Basic Bibliography* (previously only available in mimeographed form) offers a concise selection of essential and primarily recent reference materials (including books, studies and articles) in several languages and from several legal traditions; it is well organized into different subject matter categories to facilitate the rapid location of general or specific subjects of this particular part of the law. The institute's efforts and the work it has produced will be very much appreciated. For a more comprehensive (albeit somewhat less recent) bibliography, the *Basic Bibliography* makes reference to the authoritative *Bibliography of International Humanitarian Law Applicable in Armed Conflicts*, published by the International Committee of the Red Cross (ICRC) itself in 1980.

One of the books listed in the first section of the *Basic Bibliography*, which deals with "works of a general character," is that on the development of international humanitarian law by Géza Herczegh, translated into English by Sandor Simon. Because there is a fairly large number of general works on this subject from Western sources with which many readers might be more familiar, the principal interest of this book may be its socialist perspective as expressed by an author who attended the preparatory Conference of Government Experts and was subsequently a member of the Hungarian delegation to the 1974-1977 Geneva Diplomatic Conference, which formulated the 1977 Additional Protocols I and II regarding the protection of victims of international and noninternational conflicts, respectively.

The author begins with a brief history of the development of international humanitarian law, with emphasis on the effect of changing socioeconomic conditions as accompanied, expressed and reacted upon by moral, religious and legal concepts. The author provides a brief analysis of the so-called Hague and Geneva components of the law and their interrelationship, sug-



gesting that, with the extension of the "Geneva" law without the supersession of the "Hague" law, the traditional distinction between the two has become less significant and, in fact, outdated.

The balance of the work, which makes up over half the text, relates to the 1974-1977 Conference and the two 1977 Protocols, and concentrates on a rather detailed exposition of the negotiation and formulation of provisions relating to civilian protection, guerrilla status and belligerent reprisals in the first Protocol, and noninternational conflicts in the second Protocol. The author regards these areas as "theoretical" developments of the law worthy of close attention, rather than merely "quantitative" increases in the law, however laudable such latter provisions should be considered. These developments are viewed as the positive, if certainly imperfect, result of a lawmaking process in which the number of negotiating parties has made compromise as difficult as it is essential.

In conclusion, the author regards the adoption of the two Protocols as widening the field of application of the law (albeit without guaranteeing its effectiveness pending the unclear outcome of the ratification process) and broadening the scope of protected persons and objects (albeit with less categorical and more ambiguous provisions). Perhaps the most troublesome comment he makes about the development of humanitarian law is that the objective of universal, detailed regulation has diminished the simplicity and intelligibility of the legal provisions, which, unfortunately, may very well hinder their general comprehension by nonspecialists and, hence, their practical application.

The author's own bibliography suggests both the source of potential interest in this work (with its predominantly continental and East European sources) and the importance of the first work reviewed above, together with the larger ICRC bibliography (with their more ecumenical inclusion of Anglo-American and continental as well as other Western and non-Western sources).

RICHARD KENNEDY GUELF  
*Of the District of Columbia Bar*

*The International Committee of the Red Cross.* By Georges Willemin and Roger Heacock under the direction of Jacques Freymond. Boston, The Hague, Dordrecht, Lancaster: Martinus Nijhoff Publishers, 1984. Pp. iv, 209. \$45.75; £30.50.

Some books still manage to present a great amount of useful information in a clear and concise manner. This new study, written under the able direction of Jacques Freymond, is such a book. Its title, however, requires some temporal limitation, since some readers may actually expect a history of the Red Cross from its inception. The authors did not intend such a general study in view of the existing works by Pierre Boissier, André Durand, David Forsythe, Jacques Freymond, Max Huber and others. What is offered here is a very detailed picture of the activities of the International Committee of the Red Cross (ICRC) since the Second World War, which saves the

reader the effort of going through all the ICRC annual reports and other ICRC publications in order to understand what the ICRC is doing today.

Although this book is listed as volume 2 of a series on "International Organization and the Evolution of World Society," volume 1 has not yet been published. This is, therefore, the first product of an ambitious research project launched on the initiative of Professor (now Judge) Roberto Ago with the aim of determining the impact of transformations in the international system since 1945 on international organizations and the latter's reaction to those transformations. The project is being conducted under the auspices of the Graduate Institute of International Studies at Geneva and the Società Italiana per la Organizzazione Internazionale at Rome. The other volumes in the series will focus on the evolution of the International Labour Office, the Food and Agriculture Organization and the World Health Organization.

After a survey of the sources used and a brief history of the ICRC from 1863 to 1945, the authors examine, in eight well-organized chapters, the transformation of the international system from 1945 to 1980 and analyze its impact on the institution. They describe the extension of the ICRC's presence in the world, the initial decrease and subsequent growth in the number of delegates, the visits to places of detention, the distribution of relief, the resources in the area of assistance, the donors, the activities of the Central Tracing Agency and the volume and kind of medical activities. The text is illustrated by 37 tables, graphs and charts, and includes an overview of expenditures.

Those readers who do not know that the ICRC and the League of National Red Cross Societies are distinct organs learn that the League was set up in 1919 and that after competence disputes between the ICRC and the League, a number of agreements had to be concluded to coordinate relief actions. On the basis of a new agreement of 1951, joint, concerted and parallel actions were carried out during and after the armed conflicts in Palestine, Greece, Korea, Hungary, Algeria, Nigeria, Vietnam and elsewhere. The relief operations launched in 1971 in favor of the new state of Bangladesh led to "quarrels for prestige" between the two institutions and to the drafting of a new agreement in 1973, clearly delimiting respective responsibilities and paving the way to a more harmonious division of labor. It appears that part of the friction has arisen in the interpretation and application of the principle of neutrality. But, as the authors rightly insist, humanitarian policy and diplomacy cannot be conducted without discretion. "The good Samaritan does not make speeches, he testifies through action" (p. 146).

This reviewer regrets that in the chapter on principles and law, the authors did not include more inside information on the 1949 Diplomatic Conference, which produced the four 1949 Geneva Conventions, and on the Diplomatic Conference of 1974-1977, which led to Protocols I and II. But there is a good bibliography at the end of the book and the ICRC commentary on the Protocols is forthcoming. An index would be a valuable addition to any future edition.

ALFRED-MAURICE DE ZAYAS  
*Geneva*

*Borba s Mezhdunarodnymi Prestupleniiami Protiv Mira i Bezopastnosti* (The Struggle with International Crimes against Peace and Security). By Iu. A. Reshetov. Moscow: Mezhdunarodnaia Otnosheniia, 1983. Pp. 223. 90 kopecks.

Roberto Ago's International Law Commission draft on state responsibility has stimulated wide discussion of the need to divide international crimes into two categories determined by the level of danger each threatens. Iu. A. Reshetov's monograph adds to the debate a collection of his colleagues' and his own thoughts on the utility of such a division and on the definition and enforcement of sanctions for each category.

Reshetov starts by tracing the history of attempts to define and punish as international crimes various acts of states and individuals. He concludes that there is reason to accept Ago's classification, seeing a measurable difference between two gradations of transgressions. The basis for distinction is whether the victim is a single state or the entire international community. For the first grade, he believes traditional international law based on treaties and conventions is adequate. For the second grade, he senses that much still needs to be done to formulate both definitions and sanctions.

When the victim is the entire international community and the perpetrator an individual, the law is already clear in Reshetov's view: the War Crimes Tribunals of Nuremberg and Tokyo and the adoption by the United Nations of the principles enunciated by them have established responsibility beyond doubt. He notes that long before World War II, piracy and counterfeiting of money were recognized as general offenses against the community of states as a whole and were punishable without regard to the nationality of the offender or the usual rules of territorial jurisdiction. In view of the developed state of the law on individuals, Reshetov decides that the open question is the responsibility of states.

In discussing state responsibility, the author falls back on the familiar Soviet attitude toward infringement of sovereignty. He holds that states can be held responsible for transgressions only under the provisions of the UN Charter. This means that upper category crimes of states must be defined in conventions or by custom as determined in familiar ways, which, nowadays, includes resolutions of the General Assembly. It also means that sanctions are exacted by resolution of the Security Council. He leaves unsaid that this means that the veto-holding states can protect themselves and their friends.

When Reshetov turns to the definition of the upper category state crimes of transgressions *erga omnes*, he indicates as already defined the crimes of colonialism, genocide, aggression, apartheid and slave trade. He presumes that more will be added with time. As to sanctions for such upper category crimes, he notes an expansion of the level of severity from the traditional reparations and restitution to the penalties imposed on Germany and its allies in the peace treaties. Thus, Germany was occupied, disarmed, demilitarized, deprived of war potential and its Nazi organizations liquidated and forever barred.

Measurement of injury to the community is a problem, as Reshetov sees it, because of the complex nature of such injury and also because the sense

of injury varies with subjective elements. Often, victims want more than material reparation; as in the case of Germany, they want revenge, to see the state and its leaders punished.

Conceptualization of transgression into two categories may seem unnecessary and strained to international lawyers of common law background. They are content with the pragmatic approach through conventions and application of the UN Charter, but it must be recognized that Europeans want a concept, a guide to those who draft conventions and vote resolutions in the Security Council and General Assembly. Perhaps also they want what they see as a propaganda advantage before the court of world public opinion, by putting precision into the generally expressed principles of peace and security set forth in the UN Charter, a precision that can be obtained more easily in this way than by a decision of the Security Council where vetos frustrate members who have no veto. Whatever the reason, it becomes evident from Reshetov's study that Soviet scholars are approaching this matter with caution, and they are going to adhere to their precious principle of sovereignty to prevent any definition or sanction that is unacceptable to the USSR.

JOHN N. HAZARD  
*Board of Editors*

*Načelo neintervencije v mednarodnih odnosih in v mednarodnem pravu.* By Danilo Türk. Ljubljana: Mladinska knjiga, 1984. Pp. 352.

The author of this book, "The Principle of Non-Intervention in International Relations and International Law," teaches international law at the Edvard Kardelj University in Ljubljana, Yugoslavia. The first half of the book is a historical analysis of the practice of intervention in the 19th and 20th centuries, with particular attention given to the period from the Second World War through 1980. The second half of the book deals with the legal aspects of the principle of nonintervention. It analyzes the opinions of legal writers, actions of the General Assembly and other bodies of the United Nations, claimed exceptions to the principle and types of intervention. The book closes with suggestions *de lege ferenda*. It has an appendix of UN documents and an extensive bibliography, but, unfortunately, no index.

Both the exposition of existing law and the proposals for further development argue for broad interpretation of the principle of nonintervention. The author rejects or narrowly interprets such purported exceptions to the principle of nonintervention as "humanitarian intervention; intervention based on the consent of the state concerned; intervention as an act of self-defense; and intervention as an act of reprisals in time of peace." He argues that the principle should today be interpreted as applying to political and economic intervention as well as military intervention.

The footnote citations and bibliography reflect the current crisis in the distribution of international legal materials, a crisis caused by the combination of high book and journal prices and the need to conserve foreign exchange for debt service. Cutbacks in book purchasing and library subscriptions in-

evitably have a negative effect on the quality of scholarship not only in Yugoslavia, but in the numerous other countries with balance-of-payments problems. The author cites the many Yugoslav works and the relevant UN materials. However, his citations to English-, German- and Russian-language materials are mainly to older works, presumably because the more recent books and journals are not available in the library of his university. The author has serious and useful suggestions for ways to develop international law to help protect against the types of intervention that could ignite major international conflicts. It seems penny-wise and pound-foolish to deny capable authors like him the materials they need to do their best work.

PETER B. MAGGS

*University of Illinois at Urbana-Champaign*

*Obshchepriznannye normy v sovremennom mezhdunaronom prave* (Generally Accepted Norms in Contemporary International Law). Responsible editor: N. N. Ul'ianova. Kiev: Naukova Dumka, 1984. Pp. 269.

"Generally accepted" norms of international law are seen by this group of Ukrainian authors as important instruments in the ideological struggle between capitalism and socialism. In their view, socialist states are attempting to create, against the opposition of imperialists, new norms designed to promote stable interstate relations and, consequently, "peace." In this monograph, which cites great numbers of Western authorities, the authors seek to establish criteria for determining the "general acceptance" of norms. They conclude that general acceptance, or "universality," which is said to be the equivalent, occurs only if a norm results from the concurrence of the wills of states with differing socioeconomic systems. This definition is said to exclude norms accepted by considerable numbers of states if they are not within different camps. To this effect, they cite Judge Manfred Lachs in the *North Sea Continental Shelf Cases* and the Soviet authors A. P. Movchan and G. V. Ignatenko. While hoping that norms will become "absolutely universal" when all states accept them, the authors find that such an ideal is rarely achievable.

Generally accepted or universal norms become "*jus cogens*" in the authors' view. This does not mean that they become eternal or unchangeable, for law keeps abreast of time. Since universality is required for recognition, norms that are limited to local recognition are to be denied this quality. Philip Jessup is criticized for arguing that international law will grow from its adoption in regional organizations. To the authors, it is "reactionary" to argue that law will grow through adoption by the "free world." They argue that differing social and economic systems have not prevented states from concurring their wills on the formulation of norms. They castigate Western authors for pretending that the Marxist approach to law as a superstructure over an economic base prevents the concurrence of states with different

bases. To make such arguments seems to the authors to reflect the arguers' desire to prevent peaceful coexistence.

As have authors in many lands, these authors turn to Roberto Ago's well-known International Law Commission draft on state responsibility to ask whether there may be two levels of generally accepted norms. They have trouble with their own senior specialist, I. I. Lukashuk, who is said to have distinguished from the generally accepted category norms that are "relatively imperative" because they relate to a special branch of law such as the law of the air or the sea. To them, proof that there is no such "relatively imperative" norm is given by the Chicago Convention of 1944 on overseas flights. They note that norms on this narrow topic cannot be rejected unilaterally or replaced even by the agreement of two or more contracting parties. They accept Ago's test of first category norms of crime as those acts that menace the interests of society as a whole (colonialism, slavery, genocide, apartheid and environmental damage), but they reject the position of some authors that the placing of some acts in a second category of crime signifies that they are not "law." They differ only in that parties may agree to reject them. Consequently, they are not "generally accepted."

For the authors, a priority source of "generally accepted" norms is the 1970 UN Resolution on Friendly Relations and Co-operation, but they look beyond that. They find such norms in conventions and even in custom. They criticize Western authors who state that Soviet international lawyers place custom in a lesser category of sources. While they reassert that treaties are preferable in creating norms, especially in new fields of law, custom plays an important part that must be recognized. Its value is evident when states do not adhere to conventions, as with the Law of the Sea Convention. In such cases, custom may be relied upon to establish general recognition by nonadherents. They suppose that custom will lose importance as codification progresses, but meanwhile, custom has an important place as a source.

The book ends with a discussion of new norms on economic relations and the protection of labor from the perils introduced by the spread of scientific and technical progress. The authors proudly proclaim that Soviet diplomacy is taking the initiative in developing these fields. The authors cite many Westerners, and there will be some among them who may be infuriated by what they will take to be misrepresentation. The book is indeed a brief to be used in the ideological struggle, but it is a learned brief. This and the outpouring of international law monographs in the USSR at present indicate that those who withdraw from the struggle in the West may find that the misrepresentations, if such they be, will be accepted by considerable segments of world public opinion, especially if the works appear in languages other than Russian.

JOHN N. HAZARD  
*Board of Editors*

*The Italian Legal System.* By G. L. Certoma. Sydney: Butterworths, 1985. Pp. 520.

The principal object of this excellent work is to present an up-to-date, comprehensive study of the Italian legal system to English-language readers, be they scholars or practitioners.

The volume is the second study in the Butterworths series "Legal Systems of the World," whose general editor, Professor W. E. Butler of London, also wrote the first volume on *Soviet Law*. It follows the series format in that it treats in a reasonable number of pages the historical development of the Italian legal system from its Roman origins to the French and German influences of the last century; its present structure; the organization of legal studies and the legal profession; the sources and basic divisions in the law (public and private); the basic constitutional provisions and the state's organization; the settlement of disputes and the organization of justice, both criminal and civil; and the general content of the various fields of private law. In the chapters devoted to the latter subject, the book deals with private law proper, commercial law and such "hybrid categories" as labor law and environmental law.

This work is recommended, for a number of reasons, to the English-speaking lawyer with an interest in comparative and foreign law. First of all, the Italian legal system remains less familiar to the common law lawyer than the French or German system, notwithstanding the efforts of a few scholars starting with M. Cappelletti, J. H. Merryman and J. M. Perillo and their 1967 book, *The Italian Legal System*, though the importance of Italian law and the interest of its most recent developments would justify equal attention.

Thus, this work fills a gap, but it also represents an outstanding example of how to present accurately to foreign lawyers the structure and content of another system. In doing so with Italian law, Dr. Certoma appears to be in an optimal position as an Australian law lecturer and solicitor and law graduate of the University of Florence.

The book gives due relevance both to the theoretical and systematic approach that is typical of Italian legal thinking and to the practical needs of the non-Italian reader. It succeeds in presenting a comprehensive picture of the whole system—public and private law, substance, procedure and institutions—which is not easily found even in Italian legal literature.

In so doing, the author considers the most recent developments in Italian law such as the process of "decodification" it is undergoing; he also examines legal reality, as opposed to mere principles such as the "persuasive authority of the judicial precedent," which is de facto attached to the decisions of the Court of Cassation.

The non-Italian reader will welcome the paragraphs dealing with the foreign relations law of Italy (e.g., foreigners, immunities, extradition), the rules on conflicts of law and of procedure, and the effects of treaties and EEC law in Italy. It is a pity that the book, though updated to early 1984, could not take into account the subsequent change in the jurisprudence of

the Constitutional Court as to the relations between Italian and EEC law, the effect of which is that in Italy, too, European law is now deemed to prevail automatically over contrary domestic provisions.

The only omission I noticed in the book refers to foreign exchange regulations, but this does not detract from the value of the volume as a whole as a remarkable piece of comparative legal work and indispensable tool for approaching the Italian legal system.

GIORGIO SACERDOTI  
*University of Bergamo*

*Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries.* By Charles Lipson. Berkeley, Los Angeles, London: University of California Press, 1985. Pp. xvii, 332. Index. \$34.95, cloth; \$11.95, paper.

Among the basic arguments heard in forums of North-South dialogue are those concerning the purpose and legitimacy of international law. International law, as it is currently regarded, is the result of the unique and peculiar economic and security needs of the Eurocentric world over the centuries. According to conventional southern wisdom, it developed at a time when the non-European world was either not involved in such matters, or was being colonized, *de facto* or *de jure*, by European powers. Thus, the southern logic would hold, new norms of international law are needed, based upon current world realities. Without delving into the intricacies of North-South politics, it is sufficient to note that any chance that such new norms will ever become reality depends in large part on the credibility of the southern version of the development of international law.

The southern critique does enjoy some credibility when one looks at the development of international economic law. Though the specifics can be argued back and forth among the various schools of thought, little argument need be entertained as to the source of international rules of economic interactions. Though stemming from principles originating in mercantilist and preindustrial European societies, transborder economic norms and rules exploded upon the scene in the 19th century, facilitating trade and investment in Europe and eventually in the rest of the world.

Where societies were familiar with basic European concepts of property, such as in North America, integration into the regime of international practice (and even leadership) was virtually assured. Societies less Eurocentric (Africa and Asia) or multi-cultural (Latin America) were less easily assimilated into the economic order.

It would be misleading to suggest that Charles Lipson's book is about the debate on economic relations between the North and the South. Its purpose is to be an objective study of the history of policy development in investor nations with regard to the protection of foreign investment. However, it was in those societies that were less easily assimilable into the dominant economic order that the more important policy choices were made. Thus,



*Standing Guard* examines the complex relationships among multinational business, investor governments and host governments, the latter being predominantly from the Third World.

The development of policy, to a large extent, coincides with the development of law in the area of international economic relations. In the previous century, this area of policy and legal development derived its fertility from the newness of the economic activities, trade, direct investment and portfolio investment, in areas of the world that for the most part were not tied into the European economic system. Challenges to these policies and legal concepts are the predominant issues in the 20th century. Lipson chronicles these developments and challenges, and provides a theoretical framework for understanding investor-nation behavior over the period.

Most of Lipson's study deals with direct investment, though mention is made of past and present portfolio investment policies. Recent events concerning governmental debt make this choice of concentration appear ill-advised. However, Lipson's analysis still remains useful. The distinction made between portfolio investment and direct investment is innocent enough. The organizational structure of international finance makes unilateral default less likely today than it was in the 19th century, when bond defaults were frequent. In fact, it was the frequency of bond defaults that led to the development, among mostly British bankers, of organized private sanctions in the form of embargoes on new loans, in light of British Government *laissez-faire* policies. The threat of private sanctions, within the context of the interlocking international financial system, has proved effective enough to prevent unilateral loan default. Nevertheless, the current threat of debtor-nation cartels causes one to question the future effectiveness of such private sanctions.

Direct foreign investment poses a different problem. Foreign investment activity in the areas of manufacturing, mining and agriculture is not as amenable to organized private sanctions, as the failure of U.S. oil companies to maintain exclusive ownership rights in the Middle East amply shows. In this area, government involvement in the protection of private investments has been more active; hence the development of international concepts of property, and rules regarding the propriety of expropriation. Government sanctions have ranged from military activity to economic sanctions. The U.S. Hickenlooper Amendment is a prime example of the latter.

Between these examples of how policy and law were developed with regard to the peculiarities of particular kinds of investment, Lipson provides his theoretical framework, which attempts to clarify the effectiveness (or lack of it) of investor-nation policy over the last century. The 19th century is characterized by strong and concentrated investor-nation resolve to deter host-nation defaults and expropriations. This resolve (as well as the characterization of host-government activities leading to it) was embodied in articulated policy and, in the case of Great Britain, was used to defend its military interventions in Latin America during this period as justified under international law. With a few exceptions (mostly coming from Latin American jurists), host nations lacked the ideological foundation to challenge these developments.

The post-World War I era is characterized by a breakdown in the concentration of international restraints. However, with the exception of the Soviet Union and a few other states, most host states continued to lack the ideology of state-directed development to offer much of a challenge to, by then, established principles of economic relations.

The period following the Second World War saw the return of concentrated international restraints, in the form of both bilateral and multilateral policies. At the same time, host governments were moving toward state-directed development, and organized challenges to established rules began to appear.

Beginning in the latter part of the 1960s, as international restraints were again decentralized, nationalistic claims of economic sovereignty became the norm, forcing investor nations, in many cases, to adapt policy to the new realities. However, it is important to note that the current period has brought little more than a stalemate with regard to the dispute over established rules of law in international economic relations.

From this summary, it would be easy to conclude that the needs of private investment and investor-nation policy always coincide. Lipson deals with this issue in the final chapters on foreign aid sanctions and expropriation insurance, using the U.S. policymaking apparatus as a model. Though Lipson's conclusions could be clearer, it does appear from his data that the coincidence of interests of the private sector and government policy does not always exist, at least in the cases of the Hickenlooper and Gonzales Amendments and expropriation insurance.

*Standing Guard* is a fine analysis of past events. As a predictor of future issues in the protection of private investment, it is less effective. However, it is not clear that this was the purpose of the book. Despite its failure to devote more pages to portfolio investment, it does provide useful insights, though not hard-and-fast predictions, on the future of that current dilemma. The specter of organized challenges by debtor nations to a highly concentrated system of international restraints against default brings to mind the immediate postwar period. It is not difficult to surmise from Lipson's analysis that the challenge for investor nations is to keep the current system of international restraints concentrated, lest the circumstances surrounding direct investment in the second postwar period be repeated in the area of portfolio investment.

CRAIG L. JACKSON  
*Of the Texas Bar*

*Barter in the World Economy.* Edited by Bart S. Fisher and Kathleen M. Harte.  
New York: Praeger Publishers, 1985. Pp. vii, 293. Index. \$39.95.

This book, which is a collection of articles that evolved from a workshop seminar conducted at the Georgetown University School of Foreign Service, would be useful to a number of persons who will pass it by—first of all, because the title suggests that the material contained inside is limited to the

subject of barter, which is only one form of (and is even considered by some to be a form distinct from) the broader subject of *countertrade*.<sup>1</sup> In fact, countertrade issues are covered quite extensively in this book, while the subject of barter, though discussed, does not predominate.

Barter, the oldest form of trade, consists of the direct exchange of goods of equal value without the use of currency (and therefore without the use of financing). Countertrade is defined by Thomas McVey in his article as

a practice in international trade in which two parties link an import transaction and an export transaction in a reciprocal fashion. In most instances, a private firm agrees to sell certain goods to a sovereign nation and simultaneously agrees to purchase certain goods from the nation in a parallel transaction.

While most authorities agree that barter is but one form of countertrade, some even argue that the two are distinguishable: unlike barter, countertrade usually refers to transactions in which both parties are paid in currency. Also, the private party to a countertrade agreement has likely been pressured by the governmental party to purchase marginally undesirable goods in the "parallel transaction."

Second, the title of this book is misleading because it states that barter (and not countertrade as a whole) is discussed only in the context of the "world economy." The potential reader might believe that this book touches solely upon issues of public international law and economics and is of little or no use to trade attorneys, especially trade attorneys engaged only in a domestic practice. Far from it; the only article that discusses countertrade purely from a public international law perspective is R. Michael Gadbaw's *The Implications of Countertrade under the General Agreement on Tariffs and Trade*.

The two articles in part I provide the private practitioner with specific, practical information on how to use countertrade (and barter) to a nongovernmental client's advantage: David N. Koschik's article analyzes sample clauses in three different kinds of countertrade agreements, and Thomas McVey's provides an *Overview of the Commercial Practice of Countertrade*, describing, in one section, over a dozen types of countertrade arrangements (one of which is barter). Also offering practical guidance is Kathleen Harte's article on *The Legal Implications of Barter and Countertrade Transactions*, in which she reviews tax, antitrust and other U.S. trade laws, including those designed to protect U.S. industry from injurious imports. And for domestic trade attorneys, there is an article by James Higgiston on *Domestic Barter* within the United States—certainly an anomalous item in this collection of articles on "barter in the world economy."

<sup>1</sup> Coeditor Bart Fisher addresses this issue in a footnote where he states: "This [introduction] uses the term *barter* to mean all forms of barter and countertrade" (p. 5 n.1). Lewis Carroll also depicted such authority over the English language in his character Humpty Dumpty (*Through the Looking Glass*) who said to Alice: "When I use a word, it means just what I choose it to mean—neither more nor less."

Part II, "Barter Scenarios," goes beyond the mechanics of countertrade to describe the motivating forces. Countertrade allows developing and non-market-economy nations to import without depleting their foreign exchange reserves. Countertrade also allows developing nations to promote their exports and their industrial development. These advantages of countertrade are discussed by Gerhart Vogt and Heinrich Nowak in *Countertrade—As Practiced in Eastern Europe*, by Millicent Schwenk in *North-South Barter Trade* and by Donna Vogt in *Barter of Agriculture Commodities Among Developing Countries*.

The U.S. and other Western Governments also have sought ways of benefiting from countertrade, but the practice is not pursued much by them. Donna Vogt's article on *U.S. Government International Barter* surveys the history of U.S. practice, particularly the Agriculture Department's program, which lasted from 1950 to 1973, the 1982 U.S.-Jamaica Barter Agreements, current laws and recent studies. Then she summarizes the advantages and disadvantages of countertrade (and barter) to the United States.<sup>2</sup>

Despite the many obstacles and disadvantages associated with countertrade from the perspective of private parties to such transactions, it is on the rise. This book provides all readers who are interested in knowing more about countertrade with a readable survey of the subject.<sup>3</sup>

SAMUEL W. BETTWY

*American Society of International Law*

*Nuclear Weapons and Law*. Edited by Arthur Selwyn Miller and Martin Feinrider. Westport and London: Greenwood Press, 1984. Pp. xiii, 415. Index. \$39.95.

*Preventing War in the Nuclear Age*. By Dietrich Fischer. Totowa, N.J.: Rowman & Allanheld, 1984. Pp. x, 236. Index. \$18.95, cloth; \$9.95, paper.

As Ortega y Gasset has trenchantly observed, law is born from despair of human nature. Arthur Selwyn Miller and Martin Feinrider, the editors of *Nuclear Weapons and Law*, have compiled a volume that implicitly reflects this point of view by suggesting that international law is the means by which a despairing humanity can at last find a successful solution to the epochal issues posed by nuclear weapons; indeed, some contributors attempt to demonstrate that such a solution has already been achieved, albeit without the consent of the nuclear weapon states.

This volume serves two important purposes: it provides for the first time a compilation of the several papers presented at a conference on nuclear weapons and law held under the auspices of the American Society of International Law (ASIL) at the Nova University Center for the Study of Law in

<sup>2</sup> Vogt echoes coeditor Fisher when she states that she "uses the word *barter* to mean all forms of barter and countertrade" (p. 169).

<sup>3</sup> The book is almost entirely without footnotes.

national community. Professor Richard Falk, for example, is willing to concede only that mere possession of nuclear weapons is not now legally condemnable (p. 115); Professor Feinrider propounds a similar view, suggesting that while some uses of nuclear weapons may be legal, these are exceptions to an "emerging proscriptive rule" (p. 105). Perhaps the most creative argumentation against the legality of nuclear weapons use is put forward by Professor Burns Weston. His review of targeting tactics and strategy serves a useful purpose by shedding light on an aspect of the law of armed conflict not often surveyed in open literature. At the same time, it should be noted that Weston's understanding of the rule of proportionality seems both novel and subjective to this reviewer, taking as its test the nature of the response provoked by an attack rather than the damage inflicted by it (pp. 170-71).

Weston and Feinrider also take the trouble to rebut an interesting argument put forward by Eugene V. Rostow at the 1982 Annual Meeting of the ASIL. This volume would have been the richer if it had included Director Rostow's remarks concerning the legality per se of nuclear weapons<sup>1</sup> and the distinction between the *lex lata* and *lex ferenda* in this context, as put so succinctly by Weston (p. 134).

A cogent summary of the two sides to the argument is provided in Professor Röling's essay. He neatly notes the paradoxical nature of the nuclear weapons dilemma, recognizes the crucial deterrent role now played by these weapons and takes as an imperative that the laws of humanity should be weighed not only against the necessities of war, but also against the demands of peace (p. 191).

Finally, the editors are to be commended for including a particularly helpful and comprehensive bibliography on the subject of nuclear weapons use, prepared by Professor Roehrenbeck. The bibliography alone will make this volume valuable to all interested in these questions.

The second part of the volume contains a number of additional and thoughtful essays concerning U.S. constitutional law and the constitutional issues posed by nuclear weapons. The provocative paper by Professor Arthur Selwyn Miller forms the centerpiece of this discussion. Miller suggests that a number of constitutional grounds constrain the President from ordering the use of nuclear weapons, e.g., that the Constitution does not and Congress cannot delegate to the Executive the power to make nuclear war, that is, the power "to threaten civilization itself" (p. 244). He also suggests that under Article II, the President may be required to execute faithfully all laws, international as well as domestic; thus, as a matter of U.S. constitutional law, the President would have a duty not to use nuclear weapons, since in Miller's opinion nuclear weapons are incompatible with international law.

Professor Milner Ball takes Miller's argument on the nondelegability of the nuclear-war-making power one step further: he sees a constitutional limit on the power of Congress to declare war, that is, Congress has not been granted the power "to declare Armageddon" (p. 295).

<sup>1</sup> These remarks may be found at 76 ASIL PROC. 25, 26 (1982).

Notable among the contributors who question Miller's theses are Professor Stanley Brubaker and Jack Goldklang. Brubaker provides a thoughtful rebuttal, including a spirited and persuasive attack on the proposition that the President has a constitutional duty to enforce international law, regardless of the will of Congress or the executive branch. Mr. Goldklang offers an exceptionally clear analysis of the U.S. Constitution that leads him to conclusions contrary to those of Miller. Finally, Professor Thomas Franck makes one of the most intriguing suggestions in this volume, that Congress could enact a statute, consistent with the Constitution, prohibiting the Executive from using nuclear war to initiate aggressive, unprovoked hostilities. This suggestion, cast as it is in terms of what Congress might be able to do constitutionally, rather than—as are Miller's theses—in terms of what the Constitution already forbids, will be welcomed by many readers of a more pragmatic turn of mind.

A compelling document included in this section of the volume is a letter of July 15, 1982 from then Department of Defense General Counsel William H. Taft IV, in which the existence is acknowledged "of the constitutional duty to reduce and, if possible, eliminate the threat that nuclear weapons pose to the individual freedom and rights of Americans set out in the Constitution" (pp. 337–38). This statement may be taken as an indication that the topic is of an importance warranting further exploration in depth by commentators. It is not necessary to agree with Miller's constitutional analysis to share his view that it is relevant to consider not whether, but to what degree, constitutional duties extend to this area.

In his book, *Preventing War in the Nuclear Age*, Professor Dietrich Fischer sets out to provide an introductory guide to what he perceives to be the problems of peace in the nuclear age and the methods available for avoiding conflict. He offers the general reader an overview of some of the more basic concepts such as national security and deterrence, and calls for the peaceful settlement of disputes and the peaceful resolution of conflict. He details his personal views of the danger posed by nuclear weapons and offers a philosophy of "what we can do" that will be familiar to the many readers of Professor Roger Fisher.

This work applies social science methodology to topics relevant to modern peace research. Perhaps out of an excess of ambition for one rather slender volume, the author treats a number of highly complex topics in very little space, which makes it impossible to achieve depth of analysis. For example, in his chapter entitled "Preventing Nuclear War," the author recommends that the United States and the USSR undertake measures such as a mutual, verifiable nuclear freeze, a comprehensive test ban and a mutual no-first-use-of-nuclear-weapons pledge. Unhappily, each of these proposals involves military, strategic and political complexities on many levels that are not even hinted at in the present volume; for instance, the author claims that the nuclear freeze proposal enjoyed substantial public support in the United States and notes that the Reagan administration strongly opposed it, without directing the reader's attention to the reasons it was supported or opposed (pp. 77–78). Whether or not one agrees with a concept such as the nuclear

freeze, surely it is not too much to expect a treatment of the pros and cons of the ramifications of the proposal, which was recently a prominent public issue.

On the whole, those who turn to this book seeking genuinely new ideas for preventing nuclear war or a comprehensive treatment of the underlying issues will come away disappointed. Rather, Fischer's book provides but a skeletal framework for discussion of one of the most pressing problems of our time.

JOHN H. MCNEILL

*U.S. Department of Defense*

*The Utilization of Nuclear Energy and International Law.* By Vanda Lamm. Budapest: Akadémiai Kiadó, 1984. Pp. 155. Index. \$14.

This book discusses some legal aspects of the peaceful uses of nuclear energy, focusing primarily on the safeguards system of the International Atomic Energy Agency (IAEA).

Chapter 1 is a discussion of the different norms that govern the use of nuclear energy. Lamm finds it difficult to accept, in theory, either the idea of an independent "nuclear law" made of national and international law norms, or that of an "international atomic law" composed of public and private international law. She acknowledges, however, certain "tendencies of unification and harmonization of laws" (p. 22) relating to the use of nuclear energy that result from close international cooperation and that, in turn, lead to a process of conversion of private international law norms into public international law. She concludes that theory and practice are in conflict and that it may be necessary, practically speaking, to combine under a common label certain national and international law norms relevant to the use of nuclear energy.

Chapter 2 is a historical recitation of the work of the United Nations Atomic Energy Commission (1946–1952). The recollection is not devoid of ideological coloration, as is evidenced by the statement that the failure of the Commission's work was due to the American Plan (the Baruch Plan) which "kept in view only the interest of the United States and was in contradiction with the principle of State sovereignty and with the United Nations Charter."

Chapter 3 provides a history of the establishment of the IAEA, its functions, its organizational structure and its relationship with the United Nations. This section, however, is primarily a textual analysis that not only shows little concern for practice but, in some cases, actually contradicts it. A specific example is the author's statement that the 1970 Treaty on the Non-Proliferation of Nuclear Weapons (NPT) signaled a "shift of function" within the IAEA in favor of safeguards at the expense of its mandate to enlarge the contribution of atomic energy to development through technical assistance. Such an assumption is not supported by the growing volume, importance and parity of both activities.

Chapter 4 deals with the IAEA safeguards system and its operation, but again fails to examine the practical evolution of the system. As a result, it is nothing more than an abstract discussion that avoids some of the "real" issues, e.g., the effectiveness of safeguards, the problems encountered in implementing them and their importance as a precedent for future arms control agreements. The theme of the chapter is that the application of safeguards implies a measure of "attack" on state sovereignty. From this premise, Lamm embarks on an enumeration of the "guarantees" accorded to those states accepting safeguards. She entirely misses the central point that IAEA safeguards constitute a service and are applied by the Agency with the consent and cooperation of the state in order to create confidence and provide assurance that its nuclear activities are peaceful. Safeguards are not an intrusion on state sovereignty against which precautions and guarantees need to be taken, but rather a mutually agreed confidence-building measure requiring the cooperation and assistance of the state.

Lamm is further off the mark when she claims that the "expulsion" (she means "suspension" since the IAEA's Statute does not include an expulsion clause) of a state from IAEA membership as a sanction for noncompliance with safeguards obligations would have the effect of permitting "the non-complying State [to] be able to continue openly and free from any obligation, to use nuclear material available to it for military purposes" (p. 77). Safeguards agreements are international agreements pertaining to particular nuclear materials. The duration of each agreement is governed by the terms of the agreement itself and is usually linked to the continued existence of the safeguarded materials. Suspension, therefore, does not in any way diminish the safeguards-related right and obligation of either the Agency or the state.<sup>1</sup>

Chapter 5 discusses regional safeguards systems. Included in this section is the safeguards system of the European Atomic Energy Community (EURATOM) and its operation in conjunction with the IAEA system. Also examined is the control system established by the Treaty for the Prohibition of Nuclear Weapons in Latin America (the Treaty of Tlatelolco), but the author fails to refer to the most penetrating and innovative feature of the control system established by this Treaty, namely, the concept of verification by challenge. Curiously, the chapter includes other regional organizations that have no safeguards or control systems and no relevance to a discussion of regional safeguards systems.

Chapter 6 deals with further measures aimed at curbing the proliferation of nuclear weapons. These include the restrictions imposed by the "London Club" of nuclear suppliers on the export of certain sensitive nuclear facilities, the Convention on the Physical Protection of Nuclear Material and the efforts to establish an International Plutonium Storage (IPS) system. The discussion of these issues is not up-to-date and does not include current developments such as the efforts being made by the IAEA Committee on Assurances of

<sup>1</sup> D. FISCHER & P. SZASZ, *SAFEGUARDING THE ATOM: A CRITICAL APPRAISAL* 146 (J. Goldblat ed. 1985).



Supply (CAS) to reconcile nuclear suppliers' concern for nonproliferation and nuclear recipients' concern for a steady supply of materials, equipment and technology.

Chapter 7 focuses on peaceful nuclear explosions. Here, the author analyzes the NPT provisions that prohibit non-nuclear-weapon states party to the Treaty from having nuclear explosive devices of their own, while allowing them to receive the benefits of the peaceful applications of nuclear explosions under international observation and through international procedures. She compares these provisions with those of the Treaty of Tlatelolco, which permit parties to carry out explosions of nuclear devices for peaceful purposes. The dilemma lies in the fact that the technology for making nuclear explosive devices for peaceful purposes is indistinguishable from the technology for making nuclear weapons. This is a thorny issue that is yet to be resolved.

The subject of this book afforded an opportunity to address certain intricate and quite interesting issues relevant to the expansion of international law to new activities prompted by scientific and technological advancement. Unfortunately, this opportunity was missed due to the author's preoccupation with the confinement of theory rather than with the pragmatic evolution of the law.

MOHAMED EL-BARADEI

*Representative of the Director-General of the IAEA to the United Nations\**

*Constitutional Law and Practice in the International Labour Organisation.*

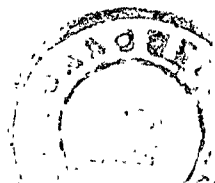
By E. Osieke. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1985. Pp. xxi, 266. Index. Dfl.160; \$52.50; £44.50.

In this book, as in his previous writings, Professor 'Osieke draws heavily on his experience as a member of the legal staff at the International Labour Office in Geneva. As he acknowledges, he is not the first insider, or former insider, to publish a study of the ILO. He does claim, though, to be the first to publish a study purely devoted to the organization's constitutional law. This appears to be so, although a good many aspects of ILO constitutional law and practice have been discussed elsewhere.<sup>1</sup>

The book is a systematic examination of constitutional issues in the ILO, including—as the title suggests—some examination of the actual practice of the organization. After a brief introduction, Osieke looks at issues relating to membership, including withdrawal, suspension and expulsion; representation, including matters relating to the credentials of members and observer status for nonmembers; the internal structure of the ILO, with attention

\* This review was written in a personal, not official, capacity.

<sup>1</sup> See, e.g., C. JENKS, *SOCIAL JUSTICE IN THE LAW OF NATIONS* (1970); G. JOHNSTON, *THE INTERNATIONAL LABOUR ORGANISATION* (1970); N. VALTICOS, *INTERNATIONAL LABOUR LAW* (1979); Valticos, *The International Labor Organization*, in *THE EFFECTIVENESS OF INTERNATIONAL DECISIONS* 134 (S. Schwebel ed. 1971).



given to the organization's unique tripartite system of representation; and the legislative, executive and judicial functions of the organization. Thus the list of constitutional topics is comprehensive, but the treatment of individual topics—other than those dealing with structure and judicial function—is a bit sketchy.

Osieke's ILO experience produces advantages and disadvantages for the reader. The obvious advantage is that the author had access to all the relevant documents, and to some unrecorded proceedings, with little risk of overlooking or misconstruing anything. The author knows whereof he speaks. However, in chapter IV, on the structure of the ILO, Osieke sometimes succumbs to the insider's temptation to give more detail than the general reader needs. He tends to be diffident about challenges to the lawfulness of some actions the ILO has taken,<sup>2</sup> and on the whole pursues a more descriptive than analytical approach. Only in chapter VII, on the ILO's judicial function, does he consistently engage in the kind of legal analysis that a critical, but disinterested, scholarly observer would undertake.<sup>3</sup>

Osieke does distance himself from the ILO staff on some issues relating to proposed changes in the structure of the organization. In particular, he is quite critical of the favored status the ILO Constitution gives to the 10 members of chief industrial importance. Under the Constitution as currently in force, those members are guaranteed 10 of the 28 government seats in the ILO Governing Body, and 5 of those 10 members must ratify any proposed amendment to the Constitution if it is to enter into force. Osieke emphatically endorses the recommendations of an ILO Working Party that would eliminate these perquisites. His enthusiasm causes him to be a bit misleading, when he makes it sound as though the necessary constitutional amendments "will" occur (pp. 136-38). It is, of course, uncertain at this stage whether or not they will.

A number of other criticisms could be made. For example, the author concludes that withdrawal from the organization is ineffective unless the member fulfills all of its financial obligations. This is certainly an arguable position under the terms of ILO Constitution Article 1(5). It seems inconsistent, however, with the author's view that South Africa effectively withdrew even though it had not met its financial obligations within the 2-year notice period, and had not demonstrated a right to withdraw on grounds that would dispense with the constitutionally mandated 2 years' notice (pp. 31-35).

At another level, it is disappointing to find cursory treatment given to the Governing Body's Committee on Freedom of Association, a vital body in the organization, while more space is given to the little-used Fact-Finding and Conciliation Commission (pp. 178-82). The development of the Com-

<sup>2</sup> See, e.g., the discussion of Namibia's admission to the ILO, pp. 24 and 48; the rejection of the Hungarian Government delegates' credentials in 1958, pp. 62-65 and 78; and the challenge to the South African employers' delegate's right to speak in the 1963 General Conference, pp. 90-91.

<sup>3</sup> Chapter VII is a revised version of Osieke, *The Exercise of the Judicial Function with Respect to the International Labour Organization*, 47 BRIT. Y.B. INT'L L. 315 (1974-1975).

mittee on Freedom of Association provides an interesting example of the creation and evolution of useful bodies within a constitutional structure that does not expressly contemplate them, yet Osieke leaves this territory unexplored.

Despite its flaws, the book is worth reading by anyone interested in the ILO's constitutional processes. It describes enough of what actually occurs in the ILO to capture and hold the attention of those who do not have experience inside the organization. Such works are necessary material for deeper scholarly analysis of the constitutional law of the ILO and of other global organizations. Osieke is to be applauded for his effort.

FREDERIC L. KIRGIS, JR.  
*Board of Editors*

*The New Law of the Sea: Selected and Edited Papers of the Athens Colloquium on the Law of the Sea, September 1982.* Edited by Christos L. Rozakis and Constantine A. Stephanou. Amsterdam, New York, Oxford: North-Holland, 1983. Pp. xiv, 354. Index. Dfl.105; \$44.75. Distributed by Elsevier Science Publishing Co., Inc.

UNCLOS III, the international community's most ambitious attempt to codify and create a comprehensive body of law, may be viewed as a dialogue between individual states and mankind on the present and future uses of the sea. The impact of this dialogue on the law of the sea and on the substantive content of the Third United Nations Convention on the Law of the Sea (Convention) is explored in this collection of papers presented at the first colloquium held following the adoption of the Convention.

Part I examines the dynamics of this dialogue—the process of agreement at UNCLOS III. Professor Barile contends that UNCLOS III's preoccupation with achieving consensus (as defined in the so-called Gentleman's Agreement approved by the General Assembly on November 16, 1973) may have actually prevented meaningful agreement on certain essential points. In particular, it delayed meaningful consideration of the impact of the proposed seabed regime on the small group of states that would be most affected by it, and consequently discouraged the development of alternatives acceptable to those states. The result was a seabed regime that lacked the necessary support. Professor Vukas, in his analysis of UNCLOS III's impact on customary international law, considers the lawmaking functions of UNCLOS III to be paramount and views the Convention as an example of the progressive development of international law. The search for consensus merely reflected a decision to address the concerns and positions of all states, not only those of the states most affected. On this basis, he is more convinced than Barile that certain provisions of the Convention will come to be accepted as customary international law. Barile and Vukas present their respective viewpoints well and these viewpoints are a recurring theme throughout the book.

The six papers in part II discuss the Convention's treatment of sovereignty and jurisdiction. Professor Ioannou briefly discusses the various meanings

of "equity" and "equitable principles" as each is used in the Convention and theorizes that the use of "equity" in the Convention provides an avenue for achieving an ad hoc resolution of disputes where a general consensus on the applicable legal principles cannot be achieved. The desirability of this approach is examined in two articles on the delimitation of the continental shelf and exclusive economic zone. Ambassador Evensen believes that the use of "equitable principles" in the provisions on delimitation indicates an absence of consensus on the legal principles applicable to continental shelf delimitation. To give some content to the Convention's language, he attempts a partial reconciliation of the significant judicial and arbitral decisions, reviews the various theories underlying the doctrine of the continental shelf and its delimitation, and discusses the application of such theories to disputes involving the exclusive economic zone. He concludes that the analysis of delimitation disputes is unaffected by the Convention. Professor Rozakis finds that the recent development of the continental shelf doctrine, in part as a result of the changes in the socioeconomic structure of the international community, reflects an attempt to reconcile the interests of individual states and the interests of that community as a whole in the uses of the sea. The Convention's provisions on the delimitation of maritime zones should not be viewed as the consequence of a failure to agree but rather as the result one would expect at this stage in the development of the law of the sea when equity demands that the interests of mankind, as well as the interests of individual states, be considered.

Part III primarily focuses on the Convention's seabed regime from both a philosophical and a practical point of view. Professor R.-J. Dupuy discusses the principle of the common heritage of mankind and its incorporation in the seabed regime. Constantine Stephanou considers the extent to which the concept of the seabed as the common heritage of mankind has become embodied in customary international law by examining the attitude of the United States toward the seabed regime and analyzing its rights in the seabed both before and after the adoption of the Convention. Professor Brown feels that the failure to reach a meaningful agreement on the issue of deep-sea mining presents each state with a difficult choice with respect to participation in the Convention's regime and he discusses in detail the analysis that each state must make in order to choose whether to participate. These papers highlight the uncertainty surrounding the legal status of the seabed regime and the importance of future state action regarding the seabed, particularly action by the United States and other states that voted against, or abstained from voting on, the adoption of the Convention.

The final part of the book contains two articles on the settlement of disputes under the Convention. Professor Riphagen reviews the evolution of dispute settlement mechanisms in international law and the modern trend to narrowness and specificity both in defining the types of disputes subject to a particular settlement mechanism and in tailoring a settlement mechanism to a particular type of dispute. The Convention is the ultimate example of this phenomenon, as is demonstrated by the variety of settlement mechanisms it provides and the latitude given states in determining whether a particular

dispute is indeed subject to a particular mechanism. Professor Caffisch provides an in-depth analysis of the available tribunals and procedures for the settlement of seabed disputes—a comprehensive system whose complexity derives from a multitude of compromises.

This is, for the most part, an excellent collection of articles that highlights the fact that the Convention is as much a product of the decision-making process at UNCLOS III as it is of the substantive agreements achieved there.

DONALD KARL  
*Of the California Bar*

*The Northwest Passage: Arctic Straits.* By Donat Pharand, in association with Leonard H. Legault. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1984. Pp. xxii, 199. Indexes. \$44.

Pharand's book on the Northwest Passage appeared at an opportune time. Shortly after its publication, the voyage through the Northwest Passage by an American icebreaker, the *Polar Sea*, sparked renewed interest in the legal status of these waters. Despite the absence of a thorough discussion of straight baselines and their effect on the water between the Canadian Arctic islands, this book provides the most comprehensive and up-to-date discussion of the Northwest Passage currently available.

The author's discussion falls into five major areas. The first segment (ch. 1) provides a description of the physical geography of the Northwest Passage and of the possible routes through the passage. The book contains a removable colored chart consisting of three very useful maps of the Arctic region.

The second and third chapters form the second segment of the book, which provides a historical background. Chapter 2 traces the history of the search for the Northwest Passage and chapter 3 discusses the actual transits of the passage from the first voyage (made by Amundsen in 1903–1906) until 1983. Since the book went to print, at least two further transits have been made: a Swedish passenger ship, the *Linblad Explorer*, in 1984, and the *Polar Sea* in 1985.

In the next segment of the book (chs. 4 and 5) Pharand examines the commercial development of natural resources in both the Canadian Arctic and Alaska. He also discusses the proposed methods for moving Arctic hydrocarbons to southern markets. One of the more interesting proposals would involve using submarine tankers nearly a quarter of a mile long.

The middle three chapters of the book deal with the legal status of the Northwest Passage. These chapters form the core of the book, which "is basically one in international law" (p. xx). The preceding and subsequent chapters are designed to provide the geographical, historical and commercial background to the legal issues. Unfortunately, this book examines in detail only one of the two major issues that must be answered in order to determine the legal status of the Northwest Passage: assuming that the waters between the Arctic islands are territorial sea, does an international strait exist through

the Northwest Passage? But the issue that perhaps should have been examined first is whether the waters between the Arctic islands are internal waters of Canada. If they are, then the question of an international strait probably does not arise. The question whether the waters are internal has gained greater importance since the recent Canadian decision to establish straight baselines from which to measure the territorial sea in the Arctic, but it was important even prior to that decision. Pharand dealt with the issue in an earlier book<sup>1</sup> and will be examining it again in a book soon to be published.<sup>2</sup> It is regrettable, however, that the two major issues concerning the legal status of the Northwest Passage were not discussed in the same study.

Be that as it may, Pharand provides a very lucid discussion of the question of an international strait, if one assumes that the waters are not internal. He concludes that the Northwest Passage meets the geographical criterion for an international strait but does not meet the functional criterion since the strait has not yet been adequately used by non-Canadian shipping. He goes on to discuss the extent of the legal control that Canada can now exercise over the waters. In particular, he reviews the ability of Canada to enforce pollution prevention regulations in the Arctic. He also examines the possibility that the Northwest Passage could become an international strait in the future.

The final chapters of the book explore the policy and legal implications of future development of the Northwest Passage. Pharand notes that the policy of the Canadian Government is to encourage the development of shipping in the Arctic, but he also notes that this development raises serious policy concerns for the environment, the Inuit and Canadian national security. He examines, in turn, each of these three topics and concludes that Canada must do more if it is to be able to exercise effectively the sovereignty that it claims over these waters. A number of Pharand's suggestions for increased Canadian activity anticipated the decisions reached by the Canadian Government after the voyage of the *Polar Sea*: to increase Canadian naval activity, to construct an icebreaker that can operate year round in the Arctic and to develop an improved capability for the detection of foreign submarines navigating in the Arctic.

Pharand concludes with a summary that may prove useful to readers seeking an abbreviated statement of what the author wrote on any one of the five general topics discussed in the book: physical description, historical development, future commercial development, legal status and policy implications. The book also contains a selected bibliography.

This book is highly recommended for anyone interested in the Northwest Passage. The reviewer looks forward to the author's forthcoming book, which will complete the study of the waters in the Canadian Arctic archipelago.

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<sup>1</sup> THE LAW OF THE SEA OF THE ARCTIC: WITH SPECIAL REFERENCE TO CANADA (1973).

<sup>2</sup> See p. 175 n.243.

*Africa's Shared Water Resources: Legal and Institutional Aspects of the Nile, Niger and Senegal River Systems.* By Bonaya Adhi Godana. London: Frances Pinter (Publishers); Boulder: Lynne Rienner Publishers, Inc., 1985. Pp. vi, 370. Index. \$27.50.

Through a study of the legal regimes and institutional frameworks of three selected African drainage basins, the author aims at outlining the major problems raised by the management of water resources in Africa, tracing the regional evolution of the law in this area and identifying and assessing Africa's contribution to the general law of international water resources.

The evolution and general principles of international water law worldwide are the subject of chapter I. The shift in emphasis from navigation to the non-navigational uses of international watercourses is noted and documented. So is the evolution of the physical notion of international rivers, from the narrow concept of the watercourse to the wider concept of the drainage basin or river system. Although this trend towards widening the scope of the physical unit serving as the basis for the international regulation of water resources is now generally well established, the author's statement (pp. 29–30 and pp. 69–70 n.51) to the effect that the International Law Commission of the United Nations has joined in that trend needs to be qualified. Preference for the drainage basin concept was expressed at one time by the then special rapporteur but is yet to be endorsed by the Commission. In fact, the term "international watercourse system" used by the rapporteur in 1980 was not repeated in 1983 by the new rapporteur, although his proposals were substantively based on the wider concept. Now that the International Law Commission has still another rapporteur on the topic who has not yet submitted a substantive report, it may be too early to predict what his or the Commission's position will be, particularly in view of the obstinate objection by some members to the wider concept. The latter remain opposed to the concept despite its obvious merits and the fact that it follows naturally from the decline of navigation and the ascendancy of other economic uses of water as the center of interest in the regulation of international rivers.

Chapter I further reviews the various theories of general international water law, ranging from the theory of absolute territorial sovereignty as reflected in the now mostly discredited Harmon doctrine, to the theory of community of interest under which no unilateral action by a basin state is permitted without the consent of all the other basin states. Special emphasis is put on the doctrine of equitable utilization, which "is now widely accepted and is central to the management of international water resources" (p. 66).

The physical, hydrological and economic aspects of the drainage basins selected for study are dealt with in chapter II, which provides the necessary factual background for the author's further analysis. Chapter III deals with the legal regulation and development during the colonial era of the three drainage basins under study. The Senegal yields little information in this regard because all the territorial units it drains were ruled by the same colonial power. The Niger provides an example of international regulation limited to navigation. Only the Nile gave rise in this period to a regime that

took non-navigational uses into account. The effects of the rules of state succession on the legal regimes of the colonial era are examined in chapter IV. The postcolonial regime of the Nile is largely a continuation of its regime during the colonial era, perhaps because a major basin state, Egypt, was never actually a colony. The Niger regime, restricted as it was to navigation, was terminated by the riparian states after their independence, while the Senegal system, it will be recalled, had no international character in the preindependence period. The present regimes of these two river systems are therefore the result of postcolonial developments.

The evolution of the Nile regime after the accession of the lower riparian states to independence, and the new regimes of the Niger and the Senegal are studied in chapter V. The author concludes (pp. 231-32) that "the treatment of the entire water system of a drainage basin as a single unit" is a characteristic of the three regimes. He notes, however, that in 1959 Egypt and the Sudan agreed on the joint exploitation of a sub-basin of the Nile to their mutual benefit, as did Burundi, Rwanda, Tanzania and Uganda in the 1977 treaty establishing the Kagera River Basin Organisation (p. 233). The current regimes of the African drainage basins studied by the author point to "the emergence of the more dynamic concept of joint development of international rivers" (p. 235). Despite some lingering reliance on the notion of sovereignty, the African basin states "do not consider that they have absolute sovereignty rights over the parts of the rivers or lakes located within their territory, nor that they are free to dispose of the water and other resources in whatever way they wish" (p. 237). Finally, the author notes that the regimes under study "contain but very elementary provisions for pollution prevention" (p. 240), compared to regimes in other parts of the world. What clearly emerges from the author's study of the three regimes in question is their deference to the principle of equitable utilization of shared water resources. This, as the author indicates in his conclusions (p. 341), is likely to serve as a guideline for African states in dealing with other shared resources.

Two chapters on the institutional mechanisms and the dispute settlement methods of the three African basin regimes complete this study. The author notes that variations in the physical, social and economic conditions of the basins "preclude a uniform pattern of organisational arrangements" (p. 290). These extend from such simple institutions as the Egyptian-Sudanese Permanent Joint Technical Committee to such a sophisticated supranational institution with far-reaching executive powers as the OMVS (an acronym derived from the French name of the Senegal River Development Organisation). As to the settlement of disputes, the preference lies generally in the direction of political means as opposed to judicial procedures (p. 319). The provision by the Senegal basin states for adjudication by the ICJ as a last resort is a welcome departure from the general trend (p. 320). On the whole, the means of settling water disputes provided for by the African basin regimes are in line with those recommended by the International Law Association in the Helsinki Rules.



The book contains a rich bibliography (pp. 347–58) that could have been rendered more complete by the inclusion of all the sources used by the author. Cited in the footnotes, but not mentioned in the bibliography, are works by Abbas, Baddour, Caponera, Crane, Fox, Lipper, Maluwa and Seyersted, among others.

Dr. Godana, a lecturer at the University of Nairobi, Kenya, has produced a meticulously researched, well-structured and cogently reasoned work, wider in scope than the available monographs on individual African watercourse systems. It should be of great value to the researcher and is a welcome addition to the scholarly literature on international water law.

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*The International Mandate System and Namibia.* By Isaak I. Dore. Boulder and London: Westview Press, 1985. Pp. xvii, 230. Index. \$22.

This book is essentially a reconsideration of the legal history of the Namibian mandate. Topical in treatment, but roughly chronological in order, it commences with a section on the essence and evolution of the mandate, continues with a critique of International Court rulings on Namibia and concludes with a section on the changing role of the United Nations vis-à-vis Namibia since 1966.

The heart of the book is in the second section, which deals with the Court, but the first two sections are in fact a virtually seamless study. Each topic analyzed in the first section—the historical background of the mandates system, the concept and nature of the mandates, and the related and sticky questions of the international status of mandates and the domestic jurisdiction of mandatories—ties into Dore's arguments in the following chapters.

The section on the International Court, concerned with its role as security for the performance of the mandate trust, is entitled "Jurisdictional Problems in the International Judicial Control of Mandates." Following an analysis of the *Mavrommatis* cases, one chapter considers the Namibian proceedings brought under the Court's advisory jurisdiction, another those under its contentious jurisdiction. The last discusses "comparative aspects."

The third section covers the last two decades under the descriptive title "Transitions . . . : The Rise and Fall of the U.N. Role." It deals with the legal (and political) aspects of revocation of the mandate and subsequent activities (or inactivities) of the General Assembly, the Council for Namibia and the Security Council.

Interwoven in the chapter called "From Mandate to Trusteeship" is a vigorous argument that the 1950 International Court opinion should have required Pretoria to place Namibia under the Trusteeship System. This argument is related to Dore's final suggestion to avoid what he rightly sees as a "drift away from a UN-sponsored solution": place Namibia under trusteeship, with (possibly) either the Contact Group or the UN and South Africa

jointly as administrator(s). The Contact Group, he claims, would have the leverage to persuade Pretoria to accept such a resolution. While representing a neat solution within the framework of his legal analysis, his proposal seems hopelessly unrealistic. The problem is pressing, but the solution lies in changes of perception in Washington and Pretoria, likely to occur only when the growing civil war in South Africa becomes an unstoppable revolution.

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*Customary International Law and Treaties.* By Mark E. Villiger. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1985. Pp. xxxiii, 432. Index. Dfl.225; \$74; £62.50.

The strong impetus given by the United Nations and its subsidiary organs to the codification of international law, together with the impressive number of conventions of codification adopted thus far, has doubtless upset the once orderly relations between customary international law and treaties. This result was inevitable since almost none of these conventions have merely codified well-known and undisputed customary rules. The vast majority of them embody provisions that are part of the "progressive development of international law," which, under Article 13(1)(a) of the UN Charter, is to be considered as having first priority, even before codification, among the studies that the General Assembly is called upon to initiate within the scope of its functions and powers. Under the circumstances, the "progressive development" component of these conventions has more often than not caused dissension between states that support "new" law and those holding to "classical" rules. As Michel Virally has rightly pointed out,<sup>1</sup> the border lines between *lex lata*, *lex ferenda* and *lex delenda* are far from being straightforward. Suffice it to say that in addressing the interactions and the interrelations between customary international law and treaties, Mark E. Villiger has tackled a timely, although difficult, topic.

Villiger divides his study into four parts. Part I describes the theoretical and factual framework that supports the entire analysis of the book, i.e., the conditions required for the formation of customary law and the codification process. Part II analyzes the possible interactions between customary and conventional rules and, in particular, the passage from unwritten law to *jus scriptum* (through a code of principles, a resolution of an international body or a convention), the inverse passage from *jus scriptum* to unwritten law (as provided by Article 38 of the 1969 Vienna Convention) and, finally, the process of modification of conventional rules by subsequent customary law. Part III deals with the implications of the parallel development of customary law and treaties, i.e., in particular, the criteria by which a conventional rule may be held as declaratory of customary law so that it is binding upon parties and nonparties and the effects of this possible lawmaking process upon parties

<sup>1</sup> Virally, *A propos de la "lex ferenda,"* in *MÉLANGES OFFERTS À PAUL REUTER* 519 (1981).

and nonparties. Part IV purports to be the experimental verification, as it were, of the previous analysis in that it compares in a practical manner the conclusions of the preceding chapters to selected articles of the 1969 Vienna Convention (Articles 18, 31, 32 and 60). This case study approach enables the author to ascertain whether these provisions can be held as declaratory of customary law and, therefore, as binding *erga omnes*.

Villiger's book is a well-documented and interestingly argued study of a topic that stands out among legally intricate and politically sensitive issues in current international law. This book, however, is first and foremost a scholarly dissertation that was submitted as a *Habilitationsschrift* in international law to the University of Zurich (Switzerland). In this respect, it is unfortunate that the work was not better edited for publication. Some scholarly distinctions remain elusive, if not controversial, such as the difference established between "interactions" and "interrelations" of customary and conventional rules. Nevertheless, this book is unquestionably a useful reference work for all those who are concerned with drawing the line between law and nonlaw in the international sphere, even if for methodological purposes the analysis principally focuses on the 1969 Vienna Convention and its *travaux préparatoires* and thus leaves aside the possible declaratory nature of some articles embodied in the 1982 Convention on the Law of the Sea.

On the whole, Villiger is right when he stresses in substance that international law lacks "a methodology for the ascertainment of the declaratory nature of written rules in the framework of modern developments" (p. 381, para. 551). Doubts, however, may be entertained as to the success achieved by the author in drawing up a true method to resolve this issue. Instead of a method, which by its nature would call for an orderly scheme of analysis, Villiger has provided us with a cluster of clues. In particular, he summarizes the criteria for assessing the declaratory nature of some treaty rules of the 1969 Vienna Convention as follows:

Was the ILC draft article based on, and did it correspond with, prior case law and State practice possibly constituting a customary rule? Did statements in the ILC concern the declaratory nature of the rule? Were these statements made individually or collectively? Were the ILC drafts and the views of members consistent, or did they vary in any way from draft to draft and from session to session?

How did States in their practice in the UN framework and since 1969 substantively define and interpret the written rule, and invoke and apply it in *casu*? Did they do so *qua* contractual obligation or *qua* customary law? Did States favour the written text? Did they assert its customary nature or see in the rule a reflexion of preexisting customary law? How did they vote? Did the conference and subsequent practice disclose a *communis opinio*? Was State practice on a general basis? How did the respective number of active, passive and dissenting States compare? Was practice uniform and consistent, both substantively and regarding the *opinio*? Could an *opinio* be inferred from material practice [p. 381, para. 552]?

To be fair, it must be said that carving out such a method is no easy task with respect to the case-by-case approach that usually prevails in asserting

Each text is accompanied by references to sources where full texts of treaties may be found, and in many instances by short bibliographical notes. Some well-known collections of decisions are not mentioned, however; e.g., James Brown Scott's *Hague Court Reports* (p. 4) and Manley O. Hudson's *World Court Reports* (p. 20).

The authors publish in each case only the "authentic" text. The volume would be more useful for English-speaking readers if English versions of documents were included whenever such texts are easily available (e.g., in the case of the Hague Conventions of 1899 and 1907). Tables of ratifications of the various instruments should have been included, as most readers do not have easy access to documentation on that subject. The authors might have followed in this respect the collection of treaties on *International Organization and Integration* (2d ed. 1981), which contains excellent ratification tables.

This collection will be very useful to anyone wanting to locate quickly a text of one of the principal treaties on the settlement of international disputes. It would be particularly useful for a delegate to a conference on the subject, or for a teacher of that topic and his students. It is more difficult to use if one is looking for a model that could be followed for drafting a new treaty on the subject. In this respect, *The Treaty Maker's Handbook* by Hans Blix (1973) is more useful (see section 10). Another example of what might have been done is the comprehensive analytical introduction to the United Nations volume entitled *Systematic Survey of Treaties for the Pacific Settlement of Disputes, 1928-1948* (L. B. Sohn ed. 1948). Neither this volume nor the companion volume, *A Survey of Treaty Provisions for the Pacific Settlement of International Disputes, 1949-1962* (edited for the United Nations by P. Contini, 1966), is mentioned in the general bibliography on the subject (p. xix). This lack of an analytical introduction is compensated to some extent by a thorough index, which helps to locate not only particular treaties but also specific provisions dealing with subjects usually covered by peaceful settlement agreements (e.g., the role of agents, the filing of applications, counterclaims or preliminary objections). A chronological list of instruments included in the volume, at least of the major ones (without the subsidiary documents), would have been helpful in finding an instrument more quickly, as the table of contents is not sufficient for that purpose.

LOUIS B. SOHN  
*Board of Editors*

## BRIEFER NOTICES

*The International Payments and Monetary System in the Integration of the Socialist Countries.* By Imre Vincze. (The Hague, Boston, Lancaster: Martinus Nijhoff Publishers; Budapest: Akadémiai Kiadó, 1984. Pp. ix, 185. Dfl.80; £20.50; \$32.) This Hungarian author is discontented with the international payments and monetary system of the socialist countries because it creates a limitation

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on trade expansion, both within the COMECON and with Western and developing states. To rectify the situation, he proposes abandonment of trade planning, except for critically short materials for which long-term intergovernmental agreements would set volume quotas. For most goods, trade would then move in accordance with contracts concluded by state enterprises under general delivery terms and CMEA pricing principles. Believing that present bilateral relationships hamper trade expansion for lack of flexibility, he favors multilaterality, but such a development would operate only if the use of money were increased. The alternative of planning multilateral trade is in his view too complicated for widespread use.

For internal COMECON trade, the monetary unit must remain what it is today, the "transferable ruble," but since this unit is meaningless for trade beyond COMECON frontiers, except for barterlike relations, he suggests that capitalist firms be authorized to open accounts which, after 3 to 6 months, could be converted into Western currencies if the depositor is unable to find desirable commodities to purchase. He makes no suggestion as to how the depositor's good faith would be determined. Of course, if there is to be conversion into Western currency, there must be attractive exchange rates, and he devotes chapters to a method of computation.

This is a closely reasoned monograph, said by the author to be likely to provoke passionate debate. This may well be so in conservative state-planning circles in socialist countries. Surely, it will also cause a stir among Westerners who will see in it a reflection of pressures mounting within some of the smaller Eastern European countries to break out of the planning system into a free market where convertible currencies would be the medium of exchange.

JOHN N. HAZARD  
*Board of Editors*

*Multilateral Trade Negotiations: World Trade After the Tokyo Round.* By Leslie Alan Glick. (Totowa, N.J.: Rowman & Allanheld, Publishers, 1984. Pp. xvi, 423. \$49.95.) This book provides a comprehensive and informative treatment of trade negotiations under the General Agreement on Tariffs and Trade (GATT). The book focuses primarily on the Tokyo Round of multilateral trade negotiations. There is also a discussion of the trade regimes before and after this round of negotiations.

The book begins by discussing the types of trade problems that are covered by the GATT. In the second chapter, the author describes the substance of the negotiations of the Tokyo Round—detailing the changes regarding both tariffs and nontariff measures. The third chapter provides an overview of the results of the multilateral trade negotiations. This chapter also discusses the various codes of trade conduct agreed to by many of the countries party to the GATT. Chapter 4 discusses the various trade codes (such as a commercial counterfeiting code) that never came into existence. Chapter 5 describes how the U.S. Congress passed laws implementing the terms of the Tokyo Round and incorporating them into U.S. domestic law. The book concludes by discussing the work done in the GATT after the Tokyo Round on all aspects of the world trading systems.

An extremely useful collection of documents relating to international trade is presented in a series of appendixes.

The book provides both an excellent introduction to the field of international trade and a comprehensive compilation of information on the subject.

STEVEN H. GRAUBART

## NEW SERIAL PUBLICATIONS

(Under this heading, we review new serial publications so as to introduce them to our readership. We do not anticipate reviewing further issues of these publications.)

*Law Reports of the Commonwealth, 1985: Constitutional and Administrative Law Reports.* General Editors, James S. Read and Peter E. Slinn. (Abingdon: Professional Books Limited, 1985. Pp. lxxviii, 1154.) The Legal Division of the Commonwealth Secretariat identified a need for going beyond the existing digests published in the quarterly *Commonwealth Law Bulletin* to provide full reports of cases from Commonwealth jurisdictions. The editors have adopted guidelines for the immense task of selecting cases—their general comparative interest, the finality of the decision, the likelihood of their being reported elsewhere and a balance of subject matters. A number of the decisions in this volume relate to issues of international law—extradition, sovereign immunity, succession to treaties of the colonial power, the law of the continental shelf and the incorporation of treaties into domestic law. While well-equipped libraries will have Canadian and British reports, and possibly Australian ones, it is a rare collection that will afford its users access to interesting cases from Mauritius, Sri Lanka and Papua New Guinea.

*Revue Québécoise de Droit International.* No. 1, 1984. Published by the Société Québécoise de Droit International. (Montreal: Editions Thémis, 1985. Pp. 438. Index. Can. \$40/yr.; F.300/yr.) The appearance of this new journal reflects a determination by the editors, predominantly from the faculties of the Universities of Laval, McGill, Montreal, Ottawa and Sherbrooke, that there was a special contribution to be made by a French-language journal of international law, given the special relationships between Quebec and the world outside. They point to the unique mixture of a private law of continental origins and a public law of British origins and to extensive personal and institutional contacts with French-speaking societies in Europe and Africa. The American reader, used to a federalism in which federal supremacy over international relations is an established fact, will be impressed by the degree of separateness with regard to foreign relations that Quebec has retained.

## BOOKS RECEIVED\*

### *International Law—General*

- Bierzaniek, Remigiusz, and Janusz Symonides. *Prawo międzynarodowe publiczne*. Warsaw: Państwowe Wydawnictwo Naukowe, 1985. Pp. 438. Zł. 300.
- Bourne, C. B. (ed.). *The Canadian Yearbook of International Law. Volume XXII, 1984*. Vancouver: University of British Columbia Press, 1985. Pp. 471. Index. \$33.50.
- Delbrück, Jost, Wilhelm A. Kewenig and Rüdiger Wolfrum (eds.). *German Yearbook of International Law. Volume 27, 1984*. Berlin: Duncker & Humblot, 1985. Pp. 599. DM 218.
- Dore, Isaak I. *International Law and the Superpowers: Normative Order in a Divided World*. New Brunswick: Rutgers University Press, 1984. Pp. xiv, 202. Index. \$30.
- Mélanges Georges Perrin*. Published by Bernard Dutoit and Etienne Grisel. Lausanne: Diffusion Payot, 1984. Pp. 325. Sw.F.49.
- Miscellanea Georges Van Hecke: Selected writings*. Antwerpen: Kluwer rechtswetenschappen, 1985. Pp. xviii, 334.
- The Palestine Yearbook of International Law. Volume I, 1984*. Nicosia: Al-Shaybani Society of International Law Ltd., 1984. Pp. 267. \$25.
- Polish Yearbook of International Law, Vol. XIII, 1984*. Wrocław: Zakład Narodowy im. Ossolińskich Wydawnictwo, 1985. Pp. 260. Zł. 420.

### *International Economic Law & Relations*

- Asian Pacific Regional Trade Law Seminar*. (Eleventh International Trade Law Seminar, held in Canberra 22–27 November 1984.) Organized by the Attorney-General's Department. Canberra: Australian Government Publishing Service, 1985. Pp. xii. 932.
- Börner, Bodo. *Studien zum deutschen und europäischen Wirtschaftsrecht*. Vol. 4. Cologne: Carl Heymanns Verlag KG, 1985. Pp. v, 603. Index. DM 130.
- Dale, Richard. *The Regulation of International Banking*. Cambridge: Woodhead-Faulkner; Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1986. Pp. viii, 208. Index. \$29.95.
- Dohm, Jürgen. *Bankgarantien im internationalen Handel*. Bern: Verlag Stämpfli & Cie AG, 1985. Pp. 229. Sw.F.76; DM 87.
- Feuer, Guy, and Hervé Cassan. *Droit international du développement*. Paris: Dalloz, 1985. Pp. xxx, 644. Index. F.148.
- Horn, Norbert (ed.). *Adaptation and Renegotiation of Contracts in International Trade and Finance*. Deventer: Kluwer, 1985. Pp. xix, 421. Index. Dfl.251; £69.50; \$106.25.
- Lavie, Jean-Pierre. *Protection et promotion des investissements: Etude de droit international économique*. Paris: Presses Universitaires de France, 1985. Pp. 331. Indexes. F.180.
- Lawlor, William R. (ed.). *Cross-Border Transactions Between Related Companies: A Summary of Tax Rules*. Deventer: Kluwer Law and Taxation Publishers, 1985. Pp. ix, 301. Dfl.75; £20; \$30, cloth.
- Mehran, Hassanali (ed.). *External Debt Management*. Washington: International Monetary Fund, 1985. Pp. x, 322.
- Rowe, Michael. *Letters of Credit*. London: Euromoney Publications, 1985. Pp. xiv, 174. £65; \$95.
- Walter, Ingo. *Secret Money: The World of International Financial Secrecy*. Lexington: D.C. Heath and Company, 1985. Pp. x, 213. Index. \$19.95.
- World Petroleum Arrangements 1985*. New York: The Barrows Company, Inc., 1985. Pp. 589.

\* Mention here neither assures nor precludes later review.

*Law of the Sea & Maritime Law*

Henry, Cleopatra Elmira. *The Carriage of Dangerous Goods by Sea: The Role of the International Maritime Organization in International Legislation*. New York: St. Martin's Press, 1985. Pp. x, 181. Index. \$29.95.

Prescott, J. R. V. *The Maritime Political Boundaries of the World*. London and New York: Methuen, 1986. Pp. xv, 377. Indexes. \$48.

Vukas, Budislav (ed.). *Essays on the New Law of the Sea*. Zagreb: Sveučilišna naklada Liber, 1985. Pp. x, 556.

*Conflicts & Disputes*

Ferrer Vieyra, Enrique. *An Annotated Legal Chronology of the Malvinas (Falkland) Islands Controversy*. Córdoba (Argentina), 1985. Pp. 173.

*Treaty Law*

Henner, M. *A Compendium of State Statutes and International Treaties in Trust and Estate Law*. Westport and London: Quorum Books, 1985. Pp. xii, 279. Index. \$55.

Reuter, Paul. *Introduction au droit des traités* (2d rev. ed.). Paris: Presses Universitaires de France, 1985. Pp. 211. Index. F.115.

*Use of Force & Law of War*

Levie, Howard S. *The Code of International Armed Conflict*. Vols. 1 and 2. London, Rome, New York: Oceana Publications, Inc., 1986. Pp. xxviii, 1099. Index. \$85/set.

*Human Rights*

Perrakis, Stelios E. *La Protection internationale des droits de l'homme*. Athens: Editions A. Sakkoulas, 1984. Pp. xxxi, 535. In Greek.

Shepherd, George W., Jr., and Ved P. Nanda (eds.). *Human Rights and Third World Development*. Westport and London: Greenwood Press, 1985. Pp. viii, 330. Index. \$45.

*International Criminal Law*

Bassiouni, M. Cherif. *International Crimes: Digest / Index of International Instruments, 1815-1985*. Vols. 1 and 2. New York, London, Rome: Oceana Publications, Inc., 1986. Vol. 1: pp. lxxvii, 512; vol. 2: pp. xl, 496. \$90/set.

*Environment & Natural Resources*

Dupuy, René-Jean (ed.). *The Future of the International Law of the Environment*. (Workshop held at The Hague, 12-14 November 1984.) Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1985. Pp. xxii, 514. \$56.60.

*National and International Boundaries*. Thesaurus Acroasium, Vol. XIV. Thessaloniki: Institute of Public International Law and International Relations, 1985. Pp. xii, 905.

Nussbaum, Ulrich J. *Rohstoffgewinnung in der Antarktis*. Vienna and New York: Springer-Verlag, 1985. Pp. xiii, 236. Index. DM 98.

Teclaff, Ludwik A. *Water Law in Historical Perspective*. Buffalo: William S. Hein Company, 1985. Pp. xi, 617. Index. \$67.50.

*Air & Space Law*

Benkö, Marietta, Willem de Graaff and Gijsbertha C. M. Reijnen. *Space Law in the United Nations*. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1985. Pp. xix, 256. Dfl.115; \$38; £31.95.

Kneifel, J. L. *Aviation Laws and Treaties of Bulgaria, the People's Republic of China, the CSSR, the German Democratic Republic, Hungary, the Democratic People's Republic of Korea, Laos, Poland, Romania, the USSR, Yugoslavia and the Republic of Vietnam*. 6 vols. Munich, 1985. Pp. 3926.



DM 290. Books may be ordered from the author (Oertlinweg 8, D-8000 Munich 90, Fed. Rep. of Germany).

#### *International Organizations*

Limpert, Martin. *Verfahren und Völkerrecht*. Berlin: Duncker & Humblot, 1985. Pp. 259. DM 96.

Monaco, Riccardo. *Lezioni di organizzazione internazionale. 1: Principi generali*. Turin: G. Giappichelli Editore, 1985. Pp. 406. L. 26.000.

#### *European Community Law*

Sobrinho Heredia, José Manuel. *Las Relaciones de cooperación para el desarrollo CEE-estados ACP*. Santiago de Compostela: Universidad de Santiago de Compostela, 1985. Pp. 273.

#### *U.S. Law and Foreign Relations*

*Documents on Germany, 1944-1985*. Dept. of State Pub. 9446. Washington: United States Department of State, 1985. Pp. xxxviii, 1421.

Friedman, Lawrence M. *A History of American Law* (2d ed.). New York: Simon & Schuster, Inc., 1986. Pp. 781. Index. \$18.95.

#### *Regional, Comparative, Foreign Law & Politics*

Altermatt, Claude, Michel Charrière and Markus Holenstein, in collaboration with Bernard Prongué. *Diplomatische Dokumente der Schweiz, 1848-1945*. Volume 2 (1866-1872). Bern: Benteli Verlag, 1985. Pp. lxxvii, 760. Indexes.

Amin, Sayed Hassan. *Islamic Law in the Contemporary World: Introduction, Glossary and Bibliography*. Glasgow: Royston Limited, 1985. Pp. ix, 190. Index. £12; \$15.

*La Democracia en América Latina: Frustraciones y Perspectivas*. Caracas: Instituto de Altos Estudios de América Latina, Universidad Simón Bolívar, 1985. Pp. 207.

Gray, K. J.; Turpin, C. C. *The Cambridge-Tilburg Law Lectures: Fifth Series 1982*. Deventer: Kluwer Law and Taxation Publishers, 1986. Pp. vii, 269. Dfl.60; £16.50; \$26.

Hecker, Hellmuth. *Materialien zum Staatsangehörigkeitsrecht in Deutschland 1970-1985*. Baden-Baden: Nomos Verlagsgesellschaft, 1985. Pp. xiv, 84.

Mirecki, Andreas, and Kurt Markus Preiss. *Grundriss des österreichischen Bewährungshilferechts*. Vienna: Manzsche Verlags- und Universitätsbuchhandlung, 1985. Pp. 135. Index. DM 41; Sw.F.36.

*Propuesta de Anteproyecto del nuevo Código Penal*. Published under the auspices of the Ministry of Justice. Madrid, 1983. Pp. 153.

Rigaux, Marie-Françoise. *La Théorie des limites matérielles à l'exercice de la fonction constituante*. Brussels: Maison Ferdinand Larcier, s.a., 1985. Pp. 335.

#### *International Relations & Politics*

Josephson, Harold (ed.). *Biographical Dictionary of Modern Peace Leaders*. Westport and London: Greenwood Press, 1985. Pp. xxvii, 1133. Index. \$85.

Kaiser, Karl, and Hans-Peter Schwarz (eds.). *Weltpolitik: Strukturen—Akteure—Perspektiven*. Stuttgart: Klett-Cotta, 1985. Pp. 742. Index.

Yoder, Amos. *World Politics and the Causes of War since 1914*. Lanham, New York, London: University Press of America, 1986. Pp. xii, 241. Index. \$23.75, cloth; \$11.25, paper.

#### *Arms Control & Disarmament*

Sivard, Ruth Leger. *World Military and Social Expenditures, 1985*. Washington: World Priorities, 1985. Pp. 52. \$5.

#### *Miscellaneous*

Dan-Cohen, Meir. *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society*. Berkeley, Los Angeles, London: University of California Press, 1986. Pp. xi, 271. Index. \$32.50.

Sakell, Achilles N. *A Ripple on the Seas*. New York: Vantage Press, 1986. Pp. xxiii, 301. Index. \$15.50.

## OFFICIAL DOCUMENTS

### UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 40/61\*

*The General Assembly,*

*Recalling* its resolutions 3034 (XXVII) of 18 December 1972, 31/102 of 15 December 1976, 32/147 of 16 December 1977, 34/145 of 17 December 1979, 36/109 of 10 December 1981 and 38/130 of 19 December 1983,

*Recalling* also the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,<sup>1</sup> the Declaration on the Strengthening of International Security,<sup>2</sup> the Definition of Aggression<sup>3</sup> and relevant instruments on international humanitarian law applicable in armed conflict,

*Further recalling* the existing international conventions relating to various aspects of the problem of international terrorism, *inter alia*, the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,<sup>4</sup> concluded at New York on 14 December 1973 and the International Convention against the Taking of Hostages,<sup>5</sup> concluded at New York on 17 December 1979,

*Deeply concerned* about the world-wide escalation of acts of terrorism in all its forms, which endanger or take innocent human lives, jeopardize fundamental freedoms and seriously impair the dignity of human beings,

*Taking note* of the deep concern and condemnation of all acts of international terrorism expressed by the Security Council and the Secretary-General,

*Convinced* of the importance of expanding and improving international co-operation among States, on a bilateral and multilateral basis, which will contribute to the elimination of acts of international terrorism and their underlying causes and to the prevention and elimination of this criminal scourge,

*Reaffirming* the principle of self-determination of peoples as enshrined in the Charter of the United Nations,

*Reaffirming also* the inalienable right to self-determination and independence of all peoples under colonial and racist régimes and other forms of

\* Adopted by the General Assembly on Dec. 9, 1985. Footnotes 1-7 to the document are part of the resolution.

<sup>1</sup> Resolution 2625 (XXV), annex.

<sup>2</sup> Resolution 2734 (XXV).

<sup>3</sup> Resolution 3314 (XXIX), annex.

<sup>4</sup> Resolution 3166 (XXVIII).

<sup>5</sup> Resolution 34/146.

alien domination, and upholding the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,

*Mindful* of the necessity of maintaining and safeguarding the basic rights of the individual in accordance with the relevant international human rights instruments and generally accepted international standards,

*Convinced* of the importance of the observance by States of their obligations under the relevant international conventions to ensure that appropriate law enforcement measures are taken in connection with the offences addressed in those conventions,

*Expressing its concern* that in recent years terrorism has taken on forms that have an increasingly deleterious effect on international relations, which may jeopardize the very territorial integrity and security of States,

*Taking note* of the report of the Secretary-General (A/40/445 and Add.1-2),<sup>6</sup>

1. *Unequivocally condemns*, as criminal, all acts, methods and practices of terrorism wherever and by whomever committed, including those which jeopardize friendly relations among States and their security;

2. *Deeply deplores* the loss of innocent human lives which results from such acts of terrorism;

3. *Further deplores* the pernicious impact of acts of international terrorism on relations of co-operation among States, including co-operation for development;

4. *Appeals* to all States that have not yet done so to consider becoming party to the existing international conventions relating to various aspects of international terrorism;

5. *Invites* all States to take all appropriate measures at the national level with a view to the speedy and final elimination of the problem of international terrorism; such as the harmonization of domestic legislation with existing international conventions, the fulfilment of assumed international obligations, and the prevention of the preparation and organization in their respective territories of acts directed against other States;

6. *Calls upon* all States to fulfil their obligations under international law to refrain from organizing, instigating, assisting or participating in terrorist acts in other States, or acquiescing in activities within their territory directed towards the commission of such acts;

7. *Urges* all States not to allow any circumstances to obstruct the application of appropriate law enforcement measures provided for in the relevant conventions to which they are party to persons who commit acts of international terrorism covered by those conventions;

8. *Further urges* all States to co-operate with one another more closely, especially through the exchange of relevant information concerning the

<sup>6</sup> A/40/455 and Add.1 and 2.

prevention and combating of terrorism, apprehension and prosecution or extradition of the perpetrators of such acts, the conclusion of special treaties and/or the incorporation into appropriate bilateral treaties of special clauses, in particular regarding the extradition or prosecution of terrorists;

9. *Urges* all States, unilaterally and in co-operation with other States, as well as relevant United Nations organs, to contribute to the progressive elimination of the causes underlying international terrorism and to pay special attention to all situations, including, *inter alia*, colonialism, racism and situations involving mass and flagrant violations of human rights and fundamental freedoms and those involving alien occupation, that may give rise to international terrorism and may endanger international peace and security;

10. *Calls upon* all States to observe and implement the recommendations of the *Ad Hoc* Committee on International Terrorism contained in its report to the General Assembly at its thirty-fourth session;<sup>7</sup>

11. *Calls upon* all States to take all appropriate measures as recommended by the International Civil Aviation Organization and as set forth in relevant international conventions to prevent terrorist attacks against civil aviation transport and other forms of public transport;

12. *Encourages* the International Civil Aviation Organization to continue its efforts aimed at promoting universal acceptance of and strict compliance with the international air security conventions;

13. *Requests* the International Maritime Organization to study the problem of terrorism aboard or against ships with a view to making recommendations on appropriate measures;

14. *Requests* the Secretary-General to follow up, as appropriate, the implementation of the present resolution and to submit a report to the General Assembly at its forty-second session;

15. *Decides* to include the item in the provisional agenda of its forty-second session.

## UNITED NATIONS SECURITY COUNCIL RESOLUTION 579 (1985)\*

*The Security Council,*

*Deeply disturbed* at the prevalence of incidents of hostage-taking and abduction, several of which are of protracted duration and have included loss of life,

*Considering* that the taking of hostages and abductions are offences of grave concern to the international community, having severe adverse consequences for the rights of the victims and for the promotion of friendly relations and co-operation among States,

*Recalling* the statement of 9 October 1985 by the President of the Security Council resolutely condemning all acts of terrorism, including hostage-taking (S/17554),

<sup>7</sup> *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 37 (A/34/37).*

\*Adopted by the Security Council at its 2637th meeting on Dec. 18, 1985.

*Recalling also* resolution 40/61 of 9 December 1935 of the General Assembly,

*Bearing in mind* the International Convention against the Taking of Hostages adopted on 17 December 1979, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents adopted on 14 December 1973, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation adopted on 23 September 1971, the Convention for the Suppression of Unlawful Seizure of Aircraft adopted on 16 December 1970, and other relevant conventions,

1. *Condemns unequivocally* all acts of hostage-taking and abduction;
2. *Calls for* the immediate safe release of all hostages and abducted persons wherever and by whomever they are being held;
3. *Affirms* the obligation of all States in whose territory hostages or abducted persons are held urgently to take all appropriate measures to secure their safe release and to prevent the commission of acts of hostage-taking and abduction in the future;
4. *Appeals* to all States that have not yet done so to consider the possibility of becoming parties to the International Convention against the Taking of Hostages adopted on 17 December 1979, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents adopted on 14 December 1973, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation adopted on 23 September 1971, the Convention for the Suppression of Unlawful Seizure of Aircraft adopted on 16 December 1970, and other relevant conventions;
5. *Urges* the further development of international co-operation among States in devising and adopting effective measures which are in accordance with the rules of international law to facilitate the prevention, prosecution and punishment of all acts of hostage-taking and abduction as manifestations of international terrorism.

## HOST COUNTRY TRAVEL REGULATIONS

### NOTE VERBALE TO THE SECRETARY-GENERAL BY THE ACTING PERMANENT REPRESENTATIVE OF THE UNITED STATES\*

The Acting Permanent Representative of the United States of America presents his compliments to the Secretary-General of the United Nations and has the honor to transmit the following note from the Department of State of the United States concerning certain measures to be applied to travel undertaken by employees of the United Nations.

\* This document, whose complete title is Note verbale dated 29 August 1985 addressed to the Secretary-General by the Acting Permanent Representative of the United States of America, is Annex I to UN Doc. ST/IC/85/48, distributed to all UN staff members on Sept. 12, 1985.

"The United States Government is increasingly concerned by reports of espionage and other clandestine activities by certain members of the United Nations Secretariat. As is known, the United States Government already regulates travel by some U.N. Mission personnel for reasons of national security. The United States Government has concluded that circumstances now make it necessary to apply the same kinds of requirements to employees of the U.N. Secretariats who are nationals of the countries represented by those missions.

"The Secretariat is accordingly requested to ensure that the following measures are implemented as of September 15, 1985, and to ensure that all other U.N. agencies—including the UNDP, UNICEF, UNFPA, and UNITAR—with staff located in New York City are aware of and comply with these measures by that date.

"All employees of the United Nations, including persons who are temporarily assigned, who are nationals of the USSR (including Byelorussia and the Ukraine), Afghanistan, Cuba, Iran, Libya, and Vietnam wishing to use common carriers for transportation (including rental vehicles) within the territory of the United States, or to use public accommodations within the territory of the United States, outside a 25-mile radius of Columbus Circle, New York City, are required to obtain such services through the Department of State's Foreign Missions Service Bureau, 41 East 42nd Street, Suite 719, New York City. With respect to Libyan nationals, this requirement shall apply to travel beyond the five boroughs of New York City.

"The Foreign Missions Service Bureau requires two working days to process travel requests. Emergency requests will be handled on a case-by-case basis. For all travel within the territory of the United States outside the 25-mile radius (or, in the case of Libyan nationals, outside the five boroughs defined above) and requiring use of common carriers or public accommodations, a request must be made in writing and should include the following information:

- full name
- date of birth
- title/position
- United Nations identification card number
- telephone number for contact
- accompanying family member
- desired itinerary
- dates of travel
- class of travel desired
- type of hotel accommodations desired (number of rooms, single or double, any special requirements)

"Official travel will be billed to the U.N. For all personal travel, payment in full is required at the same time tickets are picked up at the Service Bureau. Payment may be made by personal check, cashier's check or money order made payable to the Foreign Missions Service Bureau.

"For all travel, official and personal, by the above-cited individuals outside the 25-mile radius of Columbus Circle (or, in the case of Libyans, the five-borough limit) by whatever conveyance or means, a detailed itinerary showing routes and times must be filed two days in advance with the United States Mission to the United Nations.

"The above-named individuals are further required to obtain prior approval from the United States Mission to the United Nations for all personal travel within the United States beyond the 25-mile radius (or beyond the five-borough limit, in the case of Libyans).

"The United States Government shall reserve the right to review whether proposed travel by affected employees of the Secretariats is *bona fide* official travel of the United Nations, or unofficial travel for purposes of meeting the requirements in the above paragraph."

The United States Mission to the United Nations avails itself of this opportunity to renew to the Secretary-General of the United Nations the assurances of its highest consideration.

#### NOTE VERBALE BY THE SECRETARY-GENERAL TO THE PERMANENT REPRESENTATIVE OF THE UNITED STATES\*

The Secretary-General of the United Nations presents his compliments to the Permanent Representative of the United States of America and has the honour to refer to the note of 29 August concerning certain measures that the United States Government wishes to apply to travel undertaken by members of the Secretariat of the United Nations.

##### I

The Secretary-General has noted with concern the suggestion in the communication that certain members of the United Nations Secretariat have engaged in espionage or other clandestine activities. At no time during his term of office has the United States Administration brought to the attention of the Secretary-General any evidence or charges against any member of the Secretariat. In the absence of any specific evidence or charges, he cannot accept any blanket unsubstantiated accusation against members of the staff of the United Nations. The Secretary-General wishes to emphasize that, in his capacity as chief administrative officer of the United Nations, he would fully investigate information brought to his attention and would proceed to take quick and effective action against any staff member shown to have engaged in any improper activities against the security of the Host State.

##### II

The Secretary-General is aware that the proposed restrictive measures, which are set out in the above-mentioned note, are based on recently adopted legislation, namely certain provisions of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987. While this legislation may contain certain directives addressed to organs of the United States Government, and the measures in question are evidently proposed in implementation of these directives, the Secretary-General is of the view that these measures are not

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\* This document, whose complete title is Note verbale dated 9 September 1985 addressed by the Secretary-General to the Permanent Representative of the United States of America, is Annex II to UN Doc. ST/IC/85/48, distributed to all UN staff members on Sept. 12, 1985.

compatible with the international obligations of the United States, vis-à-vis the Organization, under the latter's Charter, under the Headquarters Agreement and under the Convention on the Privileges and Immunities of the United Nations.

In particular:

(a) The proposed measures would seem to constitute discrimination among members of the Secretariat solely on the basis of their nationality, in violation of the principle that they are all international civil servants whose primary loyalty and responsibility are to the Organization. Any discrimination among them based on nationality runs counter to the essential character of the international civil service, as envisaged in the United Nations Charter. The unity of the international civil service is absolutely essential if the Organization is to carry out its world-wide obligations with staff members whose individual nationalities might otherwise not be acceptable to the governments with whom they have to deal or within whose jurisdiction they must operate. This principle of non-discrimination, indeed non-differentiation, is designed to protect both the Organization and its staff members, including American staff members serving in various countries.

(b) As applied to official travel, the proposed measures would improperly constrain the Secretary-General's choice of what staff members are to be assigned to carry out certain functions within the United States. The final provision of the note, whereby the United States Government reserves the right to review whether travel designated as official by the Secretary-General is "*bona fide* official travel of the United Nations", raises a particular problem with regard to the Secretary-General's independent exercise of his responsibilities under the Charter, free from national interference.

(c) As applied to private travel, in respect of which the proposed measures are even more restrictive, the question may be raised whether limiting staff members, who may spend years or even their entire working career assigned to Headquarters, to a distance of 25 miles from Columbus Circle, or just to the five boroughs of New York City, is, apart from being discriminatory, unduly onerous.

### III

The note requests the Secretariat to ensure that the indicated measures are implemented. However, that would seem to be outside of both the legal and the practical capacity of the Organization. Furthermore, the Secretary-General does not see how he could instruct the Secretariat to implement measures that appear to him incompatible with the responsibilities entrusted to him by the Charter.

In view of the above, the Secretary-General would appreciate it if the United States Government could reconsider proceeding with the implementation of the proposed measures. In this connection he would like to note that the Secretary of State is given authority to waive implementation, *inter alia* when foreign policy circumstances—which would certainly encompass relations between the United Nations and the United States—so require.



## IMPLEMENTATION OF DECREE NO. 1 FOR THE PROTECTION OF THE NATURAL RESOURCES OF NAMIBIA\*

### STUDY ON THE POSSIBILITY OF INSTITUTING LEGAL PROCEEDINGS IN THE DOMESTIC COURTS OF STATES

#### REPORT OF THE UNITED NATIONS COMMISSIONER FOR NAMIBIA

#### FOREWORD

The Steering Committee of the United Nations Council for Namibia considered the present report at its 199th and 201st meetings, on 9 April and 2 May 1985, and decided:

(a) To institute legal proceedings in the domestic courts of States and other appropriate bodies against corporations and against individuals who are violating Decree No. 1 for the Protection of the Natural Resources of Namibia;<sup>1</sup>

(b) That these legal proceedings would commence in the Netherlands.

The Council considered the implementation of the Decree at its extraordinary plenary meetings, at Vienna, from 3 to 7 June 1985. At its 443rd meeting, on 7 June 1985, the Council adopted a Final Document.<sup>2</sup> In paragraph 56 of the Programme of Action of the Final Document, the Council decided to promote actively the implementation of the Decree through legal action in the domestic courts of States and through political action and consultations intended to put an end to the plunder of all Namibian natural resources; and it requested the United Nations Commissioner for Namibia to take necessary steps towards that end after consultations with the President.

(Signed) Noel G. SINCLAIR  
Acting President of the United Nations  
Council for Namibia

#### INTRODUCTION

1. Following the termination of the League of Nations mandate over Namibia in 1966<sup>1</sup> and the establishment of the United Nations Council for Namibia the following year,<sup>2</sup> it was hoped that South Africa would soon withdraw from Namibia. This did not take place and, under the aegis of what then became the illegal South African administration in Namibia, the exploitation of the natural resources of Namibia, mainly by foreign corporations, continued unabated.

\* UN Doc. A/AC.131/194 (1985). All footnotes below are part of the document.

<sup>1</sup> *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 24 (A/35/24)* vol. I, annex II; see also the annex to the present report.

<sup>2</sup> See A/40/375-S/17262, annex.

<sup>1</sup> General Assembly resolution 2145 (XXI). <sup>2</sup> General Assembly resolution 2248 (S-V).

2. Although some corporations terminated their activities after the adoption of major Security Council resolutions in 1970<sup>3</sup> and the handing down of the advisory opinion of the International Court of Justice in 1971,<sup>4</sup> the exploitation of the natural resources of Namibia continued on a large scale. Concerned over this situation, the United Nations Council for Namibia enacted Decree No. 1 for the Protection of the Natural Resources of Namibia<sup>5</sup> on 27 September 1974.

3. On that occasion, the President of the Council stated that the Council was acting in accordance with the legislative Mandate entrusted to it by the General Assembly and that formal Assembly approval would not be necessary. The Decree would be included in the report to the General Assembly in the chapter relating to the measures adopted by the Council.

4. On the basis of the informal consultations the President of the Council had held, he understood that the Decree met all the legal requirements necessary for it to be valid in the courts and that it also took into account all the relevant political aspects.<sup>6</sup>

5. The Decree covers all natural resources, animal and mineral. Its main provisions prohibit exploitation (prospecting for, mining, processing, exporting, etc.) of any Namibian natural resource without the permission of the Council and specifically invalidates any permission, licence, concession, etc., purporting to allow, or to authorize, exploitation or exportation of Namibian resources which was or is granted by the South African administration in Namibia. The Decree provides for the seizure of any Namibian natural resource taken from the Territory without Council authorization and for forfeiture of the resource so seized to the Council for the benefit of the people of Namibia. It also authorizes seizure of the vessel in which any illegally exported resources are transported and provides that any person or organization contravening the Decree may be held liable in damages by the future Government of an independent Namibia.

6. As indicated in the text of the Decree, the Council entrusted the implementation of this enactment to the United Nations Commissioner for Namibia.

7. At its twenty-ninth session, the General Assembly approved the report of the Council containing the Decree,<sup>7</sup> and adopted resolution 3295 (XXIX) of 13 December 1974, by paragraph 7 of which it requested all Member States to take all appropriate measures to ensure the full application of, and compliance with, the provisions of Decree No. 1 for the Protection of the Natural Resources of Namibia enacted by the United Nations Council for Namibia on 27 September 1974.

<sup>3</sup> Security Council resolutions 276 (1970) and 283 (1970).

<sup>4</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16.*

<sup>5</sup> *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 24 (A/35/24), vol. I, annex II; see also the annex to the present report.*

<sup>6</sup> A/AC.131/SR.209.

<sup>7</sup> *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 24A (A/9624/Add.1).*

8. In a report to the Council<sup>8</sup> on the implementation of the Decree prepared on the occasion of the extraordinary plenary meetings of the Council held at Algiers from 28 May to 1 June 1980, the Commissioner stated that following its enactment, his Office had sent copies of the Decree to all Member States, as well as to all companies known to be engaged in the exportation or exploitation of Namibian natural resources and to all those reported to be engaged in activities preliminary thereto. Copies had also been sent to shipping companies believed to be transporting Namibian resources; to known insurers of such carriers; to labour unions representing workers involved in activities relating to the exploitation of the resources or their transportation; and to other interested persons and organizations. The Decree had been translated into all of the official languages of the United Nations as well as into the German and Afrikaans languages.

9. Since that initial mailing, thousands more copies of the Decree had been distributed by the Office of the Commissioner, and copies had been sent to non-governmental organizations with which the Office of the Commissioner co-operated. Some of these organizations had redistributed copies of the Decree directly, while others had reprinted it.

10. Subsequently, the report continued, the Office of the Commissioner had received numerous inquiries concerning the Decree as the legal profession, business people, insurers and others learned of its existence. The inquiries were usually anonymous or made by a person identifying himself or herself only as an agent, adviser or lawyer for an interested person or client.

11. The Office had also co-operated with non-governmental organizations and other groups in specific activities related to implementation of the Decree. Thus, representatives of the Commissioner had at various times spoken at stockholders' meetings when Namibian investment was on the agenda and the Office had provided information to stockholders who wished to challenge investments in Namibia. In late 1974, a representative of the Commissioner had taken part in a meeting between United States oil company executives and certain shareholder representatives regarding the oil companies' concessions to explore for Namibian offshore oil. In 1975, the Continental Overseas Oil Company (CONOCO), the Getty Oil Company, the Phillips Petroleum Company and the Texaco Oil Company had relinquished their concessions, which, according to available information, had all been located off the coast between Walvis Bay and the Orange River.

12. In 1975, the report of the Commissioner continued, a legal proceeding had been instituted to block the importation of Namibian seal skins into the United States of America. The action, which was largely successful, had been initiated by the Center for Civil Rights, some United States Congressmen and a number of environmental and animal protection groups, joined by the South West Africa People's Organization (SWAPO).

13. In some cases, non-governmental organizations and other support groups had undertaken action in which the Office of the Commissioner was not involved. In Philadelphia, members of "Operation Namibia" had surreptitiously pasted "stolen from Namibia" labels on all the cans of fish from the Territory which they found on the shelves in several inner-city grocery stores. The Council had been notified by a direct communication from the

<sup>8</sup> A/AC.131/81.

group after they had completed their action. The report noted, however, that such direct action was unlikely to have any substantial effect unless (a) it touched a vital community interest (e.g. uranium supplies in an energy-poor country); (b) it was supported by a large and important segment of society (e.g. a large labour union); or (c) it received retroactive support from the Council, which was unlikely, given the unanticipated and uncontrollable nature of direct action.

14. In order to bring the Decree to the attention of the members of the legal profession, in general, and not merely to those concerned with international or company law, the Commissioner had delivered a series of lectures on the Decree to bar associations and other groups. Lawyers concerned about Namibia had been urged to raise the subject whenever possible, and professors and students had been encouraged to write about the exploitation of Namibian resources generally, or about the Decree specifically.

15. During 1975, two conferences of lawyers had been held to discuss the unprecedented legal problems raised by the Decree and how they should be handled. On 24 and 25 May of that year, an International Consultation of Lawyers had been convened at United Nations Headquarters to consider implementation of the Decree in English and English-descended common law jurisdictions. In December, a Conference of Jurists, meeting at Brussels, had discussed legal approaches and problems in Belgian and Dutch law and under the rules of the European Economic Community (EEC).

16. At the same time, the Office of the Commissioner had initiated studies of Namibian natural resources to determine the routes by which they were transported and to what intermediate or final destinations. Between 1975 and 1979, the report concluded, the Office had also commissioned papers on specific resources and on trading patterns and shipping routes, as a necessary prerequisite to implementation of the Decree.

17. In a resolution adopted at its 327th meeting, held at Algiers on 31 May 1980,<sup>9</sup> the Council took note with appreciation of the report of the Commissioner.

18. Taking up another major aspect of implementation of the Decree, on 12 July 1977, as requested by the Council, the Commissioner submitted proposals for uranium hearings. An *Ad Hoc* Committee on Uranium Hearings studied the proposals and, on 22 August 1977, issued its proposed guidelines for the hearings. The guidelines were approved by the Council at its 263rd meeting, on 7 September 1977.

19. The uranium hearings, conducted by a Panel of Council members, were held from 7 to 11 July 1980 with a representative of the Commissioner serving as a member of the Panel which conducted the hearings.

20. The hearings aroused considerable interest in the exploitation of Namibian uranium and of Namibian natural resources in general, and also rekindled discussion of the means by which the Decree might be implemented.

21. After considerable discussion, the Panel put forward, in its report on the hearings,<sup>10</sup> a strengthened definition of the role of the Decree, as follows:

<sup>9</sup> A/AC.131/80.

<sup>10</sup> *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 24 (A/35/24)*, vol. III.

"Decree No. 1, the first major legislative act of the United Nations Council for Namibia, is a domestic law of Namibia. However, the fact that the Council, the authority which legally administers Namibia and which promulgated the Decree, discharges an international responsibility for that Territory under a mandate from the United Nations, must imply an awareness and acceptance on the part of the States Members of the United Nations that the act of that authority carries international consequences. Therefore, Decree No. 1, while being a domestic law of Namibia, is also an instrument carrying international consequences for States Members of the United Nations.

"Removal of uranium from Namibia in contravention of Decree No. 1, in addition to being a violation of the domestic law of Namibia, has the additional effect that persons or entities which remove uranium in this way have no legal title to any Namibian uranium which may be in their possession. By the same token, the Council has the right, when the movement of the uranium has been traced, to bring a case in any appropriate jurisdiction."

22. The report was subsequently approved by the Council and by the General Assembly.<sup>11</sup>

23. From 30 June to 9 July 1982, the Council sent a Mission to the Federal Republic of Germany and the United Kingdom of Great Britain and Northern Ireland to contact the governing bodies of certain corporations, operating in Namibia, whose head offices were located there. The Mission explained to the corporations the illegal nature of their activities. The representatives of the corporations responded that they were acting within the legal framework established by the Governments of their respective countries and, in that light, they believed that their activities were not illegal.

24. The banks contacted stated that they were not political organizations and could take no active role in speeding up the independence process. Furthermore, they were not involved in the exploitation of natural resources and they had the positive function of mobilizing financial resources so that these could be recycled for the benefit of the local community. They also indicated that investment in Namibia demonstrated confidence in the Territory's future.

25. In its report,<sup>12</sup> the Mission concluded that it had achieved its purpose in so far as it constituted the first contact between the Council and foreign companies with interests in Namibia. It had provided an opportunity for the Council to inform companies formally of the illegality of their presence in the Territory.

26. In the latter part of 1982, the Commissioner undertook consultations with the Governments of Belgium, France, the Federal Republic of Germany, Japan, the United Kingdom and the United States in order to urge those Governments to comply with the provisions of the Decree and related United Nations resolutions.

27. The Office of the Commissioner has continued the activities of distributing the Decree, contacting non-governmental organizations with regard

<sup>11</sup> General Assembly resolution 35/227 I.

<sup>12</sup> A/AC.131/L.271.

to the Decree, giving lectures on the Decree and participating in seminars dealing with activities of foreign economic interests in Namibia, as described in the report<sup>8</sup> which the Commissioner made to the Council in 1980.

28. Representatives of the Commissioner have also participated in events organized by the Council related to the Decree, notably the Seminar on Legal Issues concerning the Question of Namibia, held at The Hague from 22 to 24 June 1981; the Seminar on the Military Situation in and relating to Namibia, held at Vienna from 8 to 11 June 1982; the Trade Union Seminar on the Implementation of Decree No. 1, held at London on 29 and 30 June 1981; the International Seminar on the Role of Transnational Corporations in Namibia, held at Washington, D.C., from 28 November to 2 December 1982; the Regional Symposium on South Africa's Illegal Occupation of Namibia: The Threat to International Peace and Security, held at Arusha from 2 to 5 April 1984; the Seminar on the Activities of Foreign Economic Interests in the Exploitation of Namibia's Natural and Human Resources, held at Ljubljana, Yugoslavia, from 16 to 20 April 1984; and the Seminar on the Efforts of the International Community to End South Africa's Illegal Occupation of Namibia, held at Montreal, Canada, from 23 to 27 July 1984.

29. The findings of these hearings and seminars indicate that foreign economic interests and transnational corporations continue to exploit the natural resources of Namibia in violation of the Decree and of relevant resolutions and decisions of the United Nations.

30. A representative of the Commissioner participated in the Council's Mission to Western Europe to seek Legal Advice on the Implementation of the Decree, which visited France, the Netherlands, the Federal Republic of Germany and the United Kingdom from 24 April to 12 May 1984.

31. In its report<sup>13</sup> the Mission made the following recommendations, *inter alia*:

"The Council should undertake immediate steps to clarify the relationship between the Decree and relevant resolutions of the Security Council, especially those regarding the question of Namibia, in order to make the Decree more effective and enforceable in those countries whose Governments consider it to be a mere recommendation of the General Assembly;

"Any legal action envisaged by the Council should be brought first in the courts of the Netherlands, that country having fully recognized the Council and its competence to enact the Decree;

"Such legal action should initially focus on the exploitation of Namibian uranium. The reasons for this recommendation included the rapid depletion of uranium deposits in the Territory and the preponderance of legal and other evidence already available on the subject;

"As for the suggestion in some countries that legal proceedings be initiated by bodies or persons other than the Council without using the Decree as the basis for such proceedings, the Council should bear in mind that adopting such a course of action might be interpreted in

<sup>13</sup> A/AC.131/133.

some circles as an admission of a certain weakness in the legal standing of the Council and/or of the Decree."

32. A Regional Symposium on International Efforts to Implement Decree No. 1 for the Protection of the Natural Resources of Namibia was held at Geneva from 27 to 31 August 1984 under the auspices of the Council. Among the participants were non-governmental organizations, lawyers, trade unions and parliamentarians.

33. The participants concluded that it was imperative to take urgent action to implement the Decree and recommended, *inter alia*, that:

"On the basis of research and legal studies in their possession, the Council and the Commissioner should take a decision to institute legal proceedings in the Netherlands as soon as possible. They should instruct lawyers in the Netherlands to prepare appropriate briefs in order to commence legal proceedings in the Courts of the Netherlands to implement the Decree at the earliest possible opportunity.

"At the same time, preparations should be made for similar legal action in other countries known to be involved in mining, transporting, processing or receiving Namibian minerals. Particular attention could be given to the case of Belgian companies, since Belgium is a member of the United Nations Council for Namibia."<sup>14</sup>

#### I. STUDIES BY LAWYERS

34. At its thirty-eighth session, following a recommendation of the United Nations Council for Namibia, the General Assembly, by paragraph 5(i) of its resolution 36/121 C of 10 December 1981, decided that the Council should "take all measures to ensure compliance with the provisions of Decree No. 1 for the Protection of the Natural Resources of Namibia,"<sup>5</sup> including consideration of the institution of legal proceedings in the domestic courts of States and other appropriate bodies".

35. The Council referred the matter to its Standing Committee II, which considered it during the first half of 1982.

36. In its report,<sup>15</sup> which was published on 2 August 1982, Standing Committee II stated that the Council would require the opinion of the Legal Counsel regarding the implications and consequences for the United Nations of the instituting by the Council, as the legal Administering Authority for Namibia, or the Commissioner, acting on behalf of the Council, of legal proceedings in the domestic courts of States, particularly with a view to determining the legal standing and responsibilities of the Council and the Commissioner in such an undertaking.

37. Noting that the Council had determined that a number of foreign economic interests involved in the exploration for, exploitation, transport, processing and purchase of, Namibian resources were based in certain Western European and other countries, the Committee stated that the Council

<sup>14</sup> A/AC.131/138.

<sup>15</sup> A/AC.131/L.254.

would require that studies be prepared by lawyers in each of these countries to examine the possibilities of instituting legal proceedings in the domestic courts of each of the countries involved.

38. The Committee suggested that a preliminary list of countries to be covered by the studies should include: (a) the United States; (b) Japan; (c) France; (d) the Federal Republic of Germany; (e) the Netherlands; (f) the United Kingdom and (g) other member States of EEC, and added that the studies would be confidential.

39. The Committee indicated that the studies should contain, *inter alia*, information on the following questions:

(a) Whether, under the domestic law of the country in question, the Council or the Commissioner, acting on behalf of the Council, or both, have legal standing to bring action in its domestic courts against those violating the Decree;

(b) The legal status in each country of:

(i) Decree No. 1 for the Protection of the Natural Resources of Namibia;<sup>5</sup>

(ii) The advisory opinion of the International Court of Justice of 21 June 1971;<sup>4</sup>

(iii) General Assembly resolutions, particularly 2145 (XXI) of 27 October 1966 and 2248 (S-V) of 19 May 1967;

(iv) Security Council resolutions, particularly 283 (1970) of 29 July 1970 and 301 (1971) of 20 October 1971;

(c) Which provision of the Decree would appear to be the most promising point of departure for legal action in the national courts of the particular country in question;

(d) A brief description of the legal system and the procedures for instituting proceedings in the courts of each country;

(e) Analysis and assessment of the strength of the case and the likely outcome of the proceedings;

(f) Analysis and assessment of alternative action, complementary action or simultaneous action to be brought in the courts of the countries in question;

(g) The approximate time that could be expected to elapse between the institution of proceedings and the judgement of the court, and the time required for a possible appeal by the parties;

(h) The approximate cost of the proceedings and of an appeal;

(i) Enforcement of the decision of the court (procedure and approximate time and cost).

40. The Committee entrusted the Commissioner for Namibia with the task of arranging the studies. With regard to item (g) on the list of countries mentioned above, the Commissioner considered that a study could most usefully be carried out in Belgium, because of previous legal work done in that country, notably in connection with the Conference of Jurists held at Brussels in December 1975.

41. The Commissioner also decided that the studies should be carried out in the various countries by practising lawyers or by persons who would



work in close co-operation with practising lawyers, rather than by academicians.

42. In the early stages, considerable difficulty was experienced in identifying lawyers qualified and willing to carry out the studies.

43. The Commissioner has now received reports from lawyers in all the countries on the preliminary list of Standing Committee II, and wishes to place before the Committee, with respect to the various countries, the answers to the questions posed by the Committee. With respect to questions (d) and (i) of paragraph 39 above, the Commissioner considered the answers to be of a purely technical nature and has not included them in the present report. With respect to question (h), the question of cost is dealt with below under "Observations".

44. The answers to the substantive questions raised by the Committee are presented on a country-by-country basis, using as far as possible the list of the Committee's questions as a framework. Under question (b), the material is usually presented in chronological order.

45. In order to avoid repeating material related to question (b), which is mentioned frequently in the lawyers' reports, the following paragraphs deal with the salient points of the advisory opinion of the International Court of Justice of 21 June 1971, General Assembly resolutions 2145 (XXI) and 2248 (S-V) as well as Security Council resolutions 283 (1970) and 301 (1971).

46. By resolution 248 (1970) of 29 July 1970, the Security Council sought an advisory opinion from the International Court of Justice.

47. In its advisory opinion of 21 June 1971, the International Court of Justice, in response to the question

"What are the legal consequences for States of the continuing presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970)?"

the Court was of the opinion:

"by 13 votes to 2,

"(1) that, the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory;

"by 11 votes to 4,

"(2) that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration;

"(3) that it is incumbent upon States which are not Members of the United Nations to give assistance, within the scope of subparagraph (2) above, in the action which has been taken by the United Nations with regard to Namibia."

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48. In reaching its opinion, the Court first reiterated its conclusions reached in 1950 and 1955:

“that . . . the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it.” (*I.C.J. Reports 1950*, p. 137).

“ . . .  
“Thus, the authority of the General Assembly to exercise supervision over the administration of South-West Africa as a mandated Territory is based on the provisions of the Charter.” (*I.C.J. Reports 1955*, p. 76).

“ . . .  
“Accordingly, the obligations of the Mandatory continue unimpaired with this difference, that the supervisory functions exercised by the Council of the League of Nations are now to be exercised by the United Nations.” (*I.C.J. Reports 1956*, p. 27).

“ . . .

49. The Court also stated, in reaching its opinion:

“74. That the Mandate had not lapsed was also admitted by the Government of South Africa on several occasions during the early period of transition, when the United Nations was being formed and the League dissolved. . .

“ . . .  
“78. In the light of the foregoing review, there can be no doubt that, as consistently recognized by this Court, the Mandate survived the demise of the League, and that South Africa admitted as much for a number of years. . .

“ . . .  
“87. The Government of France in its written statement and the Government of South Africa throughout the present proceedings have raised the objection that the General Assembly, in adopting resolution 2145 (XXI), acted *ultra vires*.

“ . . .  
“91. One of the fundamental principles governing the international relationship thus established [by the mandate] is that a party which disowns or does not fulfil its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship.

“ . . .  
“94. In examining this action of the General Assembly [resolution 2145 (XXI)] it is appropriate to have regard to the general principles of international law regulating termination of a treaty relationship on account of breach . . . only a material breach of a treaty justifies termination, such breach being defined as:

(a) a repudiation of the treaty not sanctioned by the present Convention;<sup>16</sup>

<sup>16</sup> The Vienna Convention on the Law of Treaties.

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty (Art. 60, para. 3).

"95. General Assembly resolution 2145 (XXI) determines that both forms of material breach had occurred in this case.

"96. It has been contended that the Covenant of the League of Nations did not confer on the Council of the League power to terminate a mandate for misconduct of the mandatory and that no such power could therefore be exercised by the United Nations, since it could not derive from the League greater powers than the latter itself had. For this objection to prevail it would be necessary to show that the mandates system, as established under the League, excluded the application of the general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character (as indicated in Art. 60, para. 5, of the Vienna Convention). The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside the treaty, in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded.

"105. Relying on these decisions of the Court, the General Assembly declared that, the Mandate having been terminated, 'South Africa has no other right to administer the Territory'. This is not a finding on facts, but the formulation of a legal situation. For it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred by adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design.

"113. It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to 'the decisions of the Security Council' adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council. If Article 25 had reference solely to decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter.

"114. It has also been contended that the relevant Security Council resolutions are couched in exhortatory rather than mandatory language and that, therefore, they do not purport to impose any legal duty on any State nor to affect legally any right of any State. The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been

in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.

“115. Applying these tests, the Court recalls that in the preamble of resolution 269 (1960), the Security Council was ‘*Mindful* of its responsibility to take necessary action to secure strict compliance with the obligations entered into by States Members of the United Nations under the provisions of Article 25 of the Charter of the United Nations’. The Court has therefore reached the conclusion that the decisions made by the Security Council in paragraphs 2 and 5 of resolutions 276 (1970), as related to paragraph 3 of resolution 264 (1969) and paragraph 5 of resolution 269 (1969), were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25. The decisions are consequently binding on all States Members of the United Nations, which are thus under obligation to accept and carry them out.

“116. Thus when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for Member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.

“119. The Member States of the United Nations are, for the reasons given in paragraph 115 above, under obligation to recognize the illegality and invalidity of South Africa’s continued presence in Namibia. They are also under obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia, subject to paragraph 125 below.

“124. The restraints which are implicit in the non-recognition of South Africa’s presence in Namibia and the explicit provisions of paragraph 5 of resolution 276 (1970) impose upon Member States the obligation to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory.”

50. It should also be noted that, as was pointed out in the written statement submitted to the International Court of Justice on behalf of the Secretary-General of the United Nations in 1970,

“... although a State may be unable to control some private acts carried out by its citizens within Namibia under the protection of the illegal South African régime, the results of such private acts may nevertheless call for the participation or sanction of the State in order to acquire legal recognition outside Namibia.”

51. By its resolution 2248 (S-V), the General Assembly established the United Nations Council for Namibia and entrusted to it, *inter alia*, the following powers and functions, to be discharged in the Territory:

- (a) To administer Namibia until independence, with the maximum possible participation of the people of the Territory;
- (b) To promulgate such laws, decrees and administrative regulations as are necessary for the administration of the Territory until a legislative assembly is established following elections conducted on the basis of universal adult suffrage.

52. By its resolution 283 (1970), the Security Council called upon all States to ensure that companies and other commercial and industrial enterprises owned by, or under direct control of the State, cease all dealings with respect to commercial or industrial enterprises or concessions in Namibia; it also called upon all States to withhold from their nationals, or companies of their nationality not under direct government control, government loans, credit guarantees and other forms of financial support that would be used to facilitate trade or commerce with Namibia.

53. The Security Council further called upon all States to ensure that companies and other commercial enterprises owned by, or under direct control of, the State cease all further investment activities including concessions in Namibia; it also called upon all States to discourage their nationals, or companies of their nationality not under direct governmental control, from investing or obtaining concessions in Namibia and to this end withhold protection of such investment against claims of a future lawful Government of Namibia.

54. By its resolution 301 (1971) of 20 October 1971, the Security Council endorsed the advisory opinion of the International Court of Justice.

55. By the same resolution, the Security Council also declared that all matters affecting the rights of the people of Namibia were of immediate concern to all Members of the United Nations; the Council called upon all States in the discharge of their responsibilities towards the people of Namibia to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which might entrench its authority over the Territory.

56. The Security Council further declared that franchises, rights, titles or contracts relating to Namibia granted to individuals or companies by South Africa after the adoption of General Assembly resolution 2145 (XXI) were not subject to protection or espousal by their States against claims of a future lawful Government of Namibia.

#### A. BELGIUM

57. The report on the possibility of instituting legal proceedings in the domestic courts of Belgium was carried out by a practising lawyer and a team of specialists in international law at a major Belgian university. In its introduction, the report states that the obligation of Belgium concerning respect for, and implementation of, the Decree cannot be disjoined from the special duty that all States Members of the United Nations have towards a people and towards a Territory which depends exclusively on the United Nations for the international protection of its rights and interests.

*Question (a)*

58. After a detailed examination, the report concludes that the United Nations Council for Namibia is a subsidiary organ of the General Assembly under Article 22 of the Charter of the United Nations and that the question of the legal standing of the Council to bring action in domestic courts is therefore not distinct from that of the United Nations itself.

59. According to Article 104 of the Charter of 26 June 1945 (Belgian Law of 14 December 1945, *Moniteur Belge*, January 1946):

“The Organization shall enjoy in the Territory of each of its members such legal capacity as may be necessary for the exercise of its purposes.”

Article I, section I, of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946<sup>17</sup> (Belgian Law of 28 August 1948, *Moniteur Belge*, 15, 16 and 17 November 1948) further provides:

“the United Nations shall possess juridical personality. It shall have the capacity:

(c) To institute legal proceedings.”

These two provisions are self-sufficient. No implementing legislation is necessary to endow the United Nations with legal capacity to institute legal proceedings in Belgium. The *locus standi* of the United Nations was recognized by a Belgian Court in the case *Organisation des Nations Unies C.B. . . . et autres*, Brussels Civil Tribunal, 27 March 1952.<sup>18</sup>

60. The report further states that the intention of the General Assembly was to entrust the Council with the administration of the Territory of Namibia pending its independence. Such powers are so wide that they evidently include municipal capacity, given anyway by Article 104 of the Charter and section I of the Convention on Privileges and Immunities of the United Nations, and ability to institute legal proceedings. In this regard, the situation is very similar to the precedent of the United Nations temporary executive authority entrusted for six months with the Territory of West Irian, between the departure of the Netherlands administration and the establishment of Indonesian sovereignty.

61. Since executive and administrative tasks have been entrusted to the United Nations Commissioner for Namibia, it can be concluded that, under the domestic law, the Commissioner, acting on behalf of the Council, has legal standing to bring action in the domestic courts in order to obtain proper application of the Decree.

*Question (b)*

62. The Belgian lawyer declares that just as the General Assembly, acting within the framework of collective United Nations responsibilities, had the necessary competence in 1946 to refuse the annexation of the Territory under Mandate by South Africa,<sup>19</sup> the Assembly also had the competence to terminate the mission which the Mandatory Power had deliberately refused to accomplish.

<sup>17</sup> General Assembly resolution 22A (I).

<sup>18</sup> *Pasicrisie*, 1953, III, 65.

<sup>19</sup> General Assembly resolution 65 (II).

63. As the advisory opinion of the International Court of Justice of 21 June 1971<sup>4</sup> clearly states, the General Assembly only enforced the rules of the Vienna Convention on the Law of Treaties concerning the termination of a treaty in case of infringement of a clause essential to the carrying out of the object or the goal of the treaty (see art. 60 of the Convention).

64. General Assembly resolution 2145 (XXI) of 27 October 1966 terminating the Mandate exercised by South Africa was adopted by an overwhelming majority. One hundred and fourteen States, including Belgium, voted for it. Only South Africa and Portugal, then its ally, voted against; three States, namely France, Malawi and the United Kingdom, abstained.

65. Belgium's positive vote is linked to its will to contribute to facilitating the exercise of the right of self-determination by the Namibian people and, in doing so, it recognizes the fact that the administration of the Territory by South Africa constitutes the real obstacle to the exercise of this right.

66. With regard to General Assembly resolution 2248 (S-V) of 19 May 1967, the lawyer states that the United Nations Council for Namibia is a subsidiary organ which the Assembly is entitled to establish in accordance with Article 22 of the Charter. Furthermore, its existence has been recognized by the Security Council.<sup>20</sup>

67. It is clear that the General Assembly is legally entitled to administer Namibia directly through a subsidiary organ, considering Articles 22, 81 and 85 of the Charter and the precedents which were set (e.g. the establishment of the United Nations Palestine Commission), as well as the lack of objection from States with regard to this power of the General Assembly.

68. Belgium abstained during the vote on General Assembly resolution 2248 (S-V). By its subsequent conduct however, Belgium showed itself to be realistic. It implicitly admitted the lawfulness of the creation of the United Nations Council for Namibia as an organ competent to administer the Territory, or at best recognized *de facto* the competence and powers of the Council, when it became a member of the Council. Since Belgium is a member of the Council, it would be difficult for it to dispute the very resolution which created the Council.

69. With regard to the advisory opinion of the International Court of Justice, the report notes that, as a rule, an opinion may be mandatory yet not binding to the extent that it does not create the law as a judgement would. This stand is accepted in Belgium.

70. The Court is not a law-making body. It only declares the law as it is. Being an organ entrusted with the task of stating the law, however, the Court's opinions carry considerable weight; to negate them would be tantamount to transgressing the existing law.

71. Belgium expressed its support for the opinion requested by the Security Council in its resolution 283 (1970) of 29 July 1970 and given by the International Court of Justice on 21 June 1971. By its resolution 301 (1971) of 20 October 1971, the Security Council endorsed the advisory opinion of the Court. This resolution of the Council was expressly approved by Belgium, then a member of the Security Council, and Belgium voted in favour of its adoption. Only France and the United Kingdom abstained.

<sup>20</sup> Security Council resolutions 283 (1970), 366 (1974) and 385 (1976).

72. Security Council resolution 283 (1970), the report notes, was adopted by 13 votes to none, with 2 abstentions. Belgium, which was not at the time a member of the Security Council, had no opportunity to express itself on this resolution. Its behaviour, as well as subsequent statements and votes, show, however, that Belgium recognizes the binding character of Council resolution 283 (1970).

73. Belgium closed its honorary consulate at Windhoek, as did the majority of Western States. In the same way, in respect of the bilateral Belgian-South African treaties applicable to Namibia, the Minister for Foreign Affairs of Belgium, in response to a question on the application to Namibia of the Belgian-South African Cultural Agreement of 1954, declared that his Government would remind South Africa of the fact that Namibia should be left out of the application of this Agreement.

74. On the other hand, Belgium did not take any measures to discourage commercial relations with Namibia, although Belgium does recognize that the Council is invested with decision-making power in the exercise of its responsibilities towards the Territory.

75. As indicated above, the lawyer points out that whereas France and the United Kingdom abstained (with 13 members voting in favour and none against), Belgium, which was then a member of the Security Council, voted in favour of Council resolution 301 (1971). The Belgian representative in the Fourth Committee of the General Assembly even made a point of referring to Belgium's support for the resolution explicitly as an example of the interest evinced by Belgium in the welfare of the Namibian people.<sup>21</sup>

76. Belgium had yet another opportunity to express itself on the Namibian issue during its membership of the Security Council in 1971 and 1972 when it voted in favour of Council resolutions 309 (1972) and 310 (1972) of 4 February 1972, which were adopted by 13 votes to none, with France and the United Kingdom abstaining.

77. After the enactment of the Decree by the United Nations Council for Namibia on 27 September 1974, the General Assembly, by its resolution 3295 (XXIX) of 13 December 1974, requested all Member States to take appropriate measures to ensure the full application of, and compliance with, the provisions of the Decree. The above resolution was adopted by 112 votes to none, with 15 abstentions, which included Belgium and other member States of EEC.

78. The lawyer's report, however, goes on to stress that "reservations" expressed in very general and vague terms cannot impair the applicability of legally justified international decisions or invalidate past engagements, such as the one subscribed to in Security Council resolution 301 (1971).

79. Furthermore, the lawyer asserts, "a State cannot try to evade its international obligations by levelling vague and groundless insinuations". Besides, by giving notification of the Decree to ship-owners, the Belgian Government implicitly recognized its lack of confidence in its own position. Moreover, it seems that this restrictive position was no longer expressed by the Belgian Government later on.

<sup>21</sup> See A/C.4/SR.2123.



80. With regard to the enforceability of the Decree by the municipal courts in Belgium, the lawyer states that, apart from the point of view of the Belgian Government which is relevant to appreciate whether Belgium is bound as a State by international decisions, one has also to foresee the type of arguments which might be raised by private individuals or corporations sued in Belgium on the basis of the Decree.

81. The report states that various arguments might be raised such as:

- (a) That a subsidiary organ cannot issue binding decisions;
- (b) That the Decree exceeds the competence of the United Nations Council for Namibia;
- (c) That the United Nations Council for Namibia can act legally only in the Territory of Namibia;
- (d) That the Decree has no applicability in the Belgian legal order.

It examines all these arguments in detail and also cites some past cases in this regard. The report observes that the Decree is an administrative act on Namibia; and, as such, an act of foreign public law. Such character does not prevent it from being enforced by the judicial organs of other countries. In 1975, the Institute of International Law held unanimously during its session at Wiesbaden that:

"The public law character attributed to a provision of foreign law which is designated by the rule of the conflict of laws shall not prevent the application of that provision subject, however, to the fundamental reservation of public policy."

82. It is well known that, in other cases, tribunals have applied or taken into consideration rules of public foreign law.

83. The Belgian lawyer states that, in the light of the advisory opinion of the International Court of Justice, it is clear that refusal to enforce the Decree would constitute an unlawful assistance to South Africa especially when the Security Council has confirmed in a binding resolution the opinion of the Court.

84. The enforcement of the Decree is not contrary to Belgian public policy because it rests on rules and facts admitted by Belgium: permanent sovereignty over natural resources; the illegality of the South African administration in Namibia; and the necessity to administer the Territory in the interests of the indigenous population. In fact, an act that is the direct and logical consequence of rules and requirements recognized by Belgium cannot be considered inconsistent with its public policy.

85. With regard to the legal status of the Decree, the lawyer concludes that if one remembers, on the one hand, that the Belgian Government-in-exile during the Second World War used means which were similar to the ones used by the United Nations Council for Namibia, and on the other hand, that the Council is internationally recognized, one is driven to the conclusion that Belgian public policy, far from being shocked by enforcement of the Decree, would be shocked by a refusal to enforce it.

#### *Question (c)*

86. The Belgian lawyer states that it is difficult to answer this question because it implies foreseeing how problems would appear before the tribunal.

However, paragraph 1 of the Decree, which forbids exploitation, is certainly the most promising point of departure for legal action concerning the exploitation *latu sensu*<sup>22</sup> of the natural resources of Namibia. It constitutes the foundation of any action to be brought by the Council or by the Commissioner. Moreover, it can be invoked in any litigation concerning an action forbidden by article 1. According to article 1133 of the Belgian Civil Code:

“The consideration is illicit when it is prohibited by the law, when it is contrary to public policy.”

It has been seen above that contracts that violate foreign public law have been considered as being contrary to Belgian public policy. Consequently, the tribunal will dismiss any claim for the performance of illicit obligation.

87. Several provisions govern reparations for breaches of the Decree. The lawyers indicate that paragraphs 4 and 7 are the most promising points of departure for legal action because they directly entitle the Council (under para. 4) through the Commissioner (under para. 7) to bring action to seize any natural resource exported in contravention of paragraph 1 of the Decree. The Belgian domestic law does not oppose, on the one hand, the *jus standi* of the representative of the Council, and on the other hand, the enforceability of the Decree by Belgian Courts and tribunals.

88. Technically, the enforceability of the sanction is not impossible if the Decree is considered as being international law rather than foreign public law. Under the former assumption, a judge could enforce the sanction on the basis of the maxim: “International law is part of the law of the land.”

#### *Question (e)*

89. The Belgian lawyer states that the competence of the United Nations to institute legal proceedings has been recognized previously by the Brussels Civil Tribunal. In so far as the domestic law in Belgium operates, the Commissioner, acting on behalf of the United Nations Council for Namibia, has the standing to bring legal action in order to obtain application of the Decree. Furthermore, in the opinion of the lawyers, the Decree can provide a solid point of departure for legal action in Belgian courts.

90. The lawyer adds that this is largely a theoretical analysis. There are in fact no clear-cut precedents in Belgian jurisprudence. Moreover, the South African Government and its commercial partners can be expected to go to great lengths in order to avoid the eventuality of having Belgian courts set such a precedent. Therefore, if legal action is taken by the United Nations, it is certain to evoke a very strong opposition and due care would have to be taken at every level of the procedure. The lawyer observes, incidentally, that the very publicity given to these legal disputes would highlight the issues involved and provide a most effective boost to the Namibian cause in Belgian public opinion.

91. The lawyer concludes that while there can be no guarantee at all that the outcome of the proceedings would be favourable, it would be fair to say that this is a solid case which stands a reasonable chance of convincing the Court.

<sup>22</sup> “In a broad sense or by extension”.

*Question (f)*

92. The Belgian lawyer interpreted this question as a technical one and, in his response, provided information on the various legal methods for seizing property.

*Question (g)*

93. The lawyer reports that while it is impossible to give an accurate estimate of the time that would be required, one could roughly estimate one year from the institution of proceedings to the judgement of lower court, and three years for the two possible levels of appeal.

#### B. FRANCE

94. The report on French law was carried out by a practising French lawyer, who discussed the matter with six other lawyers practising in the main ports through which goods enter, and also with various non-governmental organizations concerned with human rights, *apartheid* and the question of Namibia.

95. In his introductory remarks, the lawyer states that he was informed that French diplomatic circles would be considerably embarrassed by any court case liable to receive some support from public opinion and that they would try to complicate the issue at the highest level by referring to "lofty and nebulous" steps being taken to solve the Namibian problem.

*Questions (a) and (b)*

96. The French lawyer reports that, in his opinion, judicial proceedings relating to substance brought solely on the basis of United Nations resolutions, and in particular of the Decree, seem doomed to failure, since French judges cannot legally base their decisions on international texts that have no binding force in French national law.

97. Such cases would almost certainly be dismissed on grounds of lack of competence.

98. Consequently, the French lawyer does not address himself in any detail to questions (a) and (b).

*Question (c)*

99. The lawyer reports that the best starting-point for proceedings before the French courts would be those provisions of the Decree that proclaim the principles of liberty, defence of human rights and free self-determination of peoples. These provisions clearly and explicitly reflect the provisions on this subject in the Universal Declaration of Human Rights of 1948, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the French Declaration of Rights and the French Constitution.

100. In making this statement, the lawyer appears to have in mind the alternative action described under question (f).

*Question (e)*

101. The French lawyer foresees a negative outcome for the type of proceeding principally envisaged by the Council, i.e. an action in French courts based on the provisions of United Nations resolutions or the Decree; he sees good prospects, however, for the more limited actions described under question (f).

*Question (f)*

102. The lawyer notes that United Nations organs have requested non-governmental organizations to provide the fullest possible information on the activities of corporations that are in violation of United Nations resolutions.

103. The lawyer states that it might be appropriate to initiate a number of summary proceedings (*actions judiciaires en référés*). His thinking is that non-governmental organizations could thus influence public opinion, and also that French judges have powers of investigation and inquiry in areas in which (through such accelerated consideration) the substantive problems could not be tackled but fact-finding assignments to investigate unlawful commercial transactions could be entrusted to legal practitioners, process-servers or experts. Such cases could be decided rapidly and be the subject of appeals to the Courts of Appeal, which could in turn be considered rather speedily. This would inform and alert public opinion, which would not be discouraged even if such proceedings were to fail, since the judges in summary proceedings do not have to decide on the merits of the problem posed.

104. Such action could be brought by non-governmental organizations, by individuals or by groups, including Namibians resident in France.

*Question (g)*

105. The lawyer reports that, if alternative action as suggested under question (f) were to be taken, such action, including appeals, could be settled in the space of several months.

### C. GERMANY, FEDERAL REPUBLIC OF

106. The legal study in the Federal Republic of Germany was carried out by a lawyer who is both an academician and a practising lawyer.

107. In the introduction to his report, the lawyer notes that Namibian uranium is being imported, after enrichment, into the Federal Republic of Germany, that the Government is fully informed about the extent of trade in uranium, and that the Federal Office for Trade and Industry in Eschborn receives certificates of origin for all uranium imports.

108. Formal ownership of uranium rests with the European Atomic Energy Community (EURATOM), which concludes all delivery contracts itself, or at least must approve them. The energy concerns in the Federal Republic of Germany are therefore not legal owners but rather possessors and consumers.

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109. Foreign trade and payments are governed in law by the External Trade Act. According to the Act, trade and payments are free as a matter of principle.

110. The import of nuclear fuels is specially regulated by the Atomic Energy Act. Imports fundamentally require authorization. The Federal Office for Trade and Industry is responsible for such authorization. Nuclear fuels are exempt for import licensing if the country of origin is listed as an "A/B or C" country. South Africa and Namibia are listed as one economic unit in the currently valid "A/B" import list.

*Question (a)*

111. The lawyer in the Federal Republic of Germany states that there is no doubt that the United Nations Council for Namibia has legal status to bring action in the courts of the Federal Republic. The Commissioner would also have legal status.

*Question (b)*

112. Addressing himself to the question of what is the legal force behind the Decree, the lawyer states that the main argument, *inter alia*, advanced by the Government against any binding character of the Decree is that there is no qualitative difference between the Decree and any "normal" General Assembly resolution. In other words, the Decree is nothing but a simple recommendation, and it is a purely political question whether each country should follow it or not. According to this view, the binding character ascribed to decisions of the United Nations can only be found when the decisions have been taken by the Security Council (Articles 24 and 25 of the Charter of the United Nations). The lawyer indicates, however, that two considerations oppose this line of argument:

(a) If one examines the preamble to the Decree, one finds a series of references which justify considerable doubt in the evaluation of the Decree as a "normal" General Assembly resolution. Paragraphs 2 and 4 of the preamble incorporate two resolutions adopted by the General Assembly, which are evolved directly from the principle of the right of nations and peoples to self-determination commonly recognized in international law. These are General Assembly resolution 1514 (XV) of 14 December 1960 regarding the granting of independence to colonial countries and peoples, and Assembly resolution 1803 (XVII) of 14 December 1962 regarding the sovereignty of peoples and nations over their natural wealth and resources. The first paragraph of the preamble to the Decree flows from important decisions on Namibia: namely, the decision to terminate the Mandate; the declaration that South Africa's presence in Namibia is illegal; the reaffirmation of this decision by the International Court of Justice; and the decision to establish the United Nations Council for Namibia. Both trends complement each other; the General Assembly resolutions referred to above are nothing but the general principle of the right of nations to self-determination put into specific terms, while the decisions on Namibia are nothing other than the specific extension of these resolutions to the Namibian case. This interconnection distinguishes the Decree from a "normal" General Assembly decision;

(b) The second consideration relates to the function that the United Nations Council for Namibia exercises on the basis of Security Council reso-

lutions 276 (1970) of 30 January 1970 and 301 (1971) of 20 October 1971, and General Assembly resolution 2248 (S-V) of 19 May 1967. If one accepts the claim that the Council must exercise quasi-governmental functions for Namibia, then the question must be raised as to what extent the Decree is a measure to be viewed from an international legal point of view, rather than a measure that has, in fact, the quality of a decision taken by a national Government in relation to its own Territory. In paragraph 2, the Decree draws conclusions from the declaration of the illegality of the continued presence of South Africa in Namibia and applies them to the legal relations in Namibia as regulated by South Africa itself. In paragraphs 1, 3 and 4, the Decree provides precisely for these relations; paragraphs 5 and 6 delineate the framework of sanctions to be used against those who act contrary to the prohibitions in paragraphs 1, 3 and 4. Viewed in this way, there can be no doubt that the content of the regulations in paragraphs 1 to 4 could be included, in very similar form, in any State's law of expropriation (i.e. a law that is to be respected from the international legal viewpoint).

113. If the Decree is evaluated in this way, as a measure almost equivalent to one at the national level, then this has two legal consequences:

(a) As a governmental action it has immediate and direct legal validity; since it regulates legal relations governing the Territory over which it has jurisdiction, the question of it being turned over or converted to some other form of national governmental law does not arise;

(b) Any dispute over the content of the regulations in the Decree is only conceivable in terms of general principles of international law.

114. If the Decree is viewed as an action that shares the greater weight of the Security Council resolutions with which it is closely bound, then it would not just be a recommendation of high political status, but rather a directive to be put into effect according to Articles 24 and 25 of the Charter of the United Nations at the national level.

#### *Question (c)*

115. The lawyer in the Federal Republic of Germany reports that the simplest way of implementing the Decree is to conceive of it as a quasi-national governmental action. In this case, any export or import of goods contrary to the directives of the Decree is unlawful. Exporting firms dispose of things unlawfully that are not in their possession. On this basis, there would then exist the possibility of direct and immediate application of criminal law to any case of import into the Federal Republic of Germany.

116. The lawyer also considers another approach, whether the striking contradictions between *laissez-faire* principles contained in the import list and the paragraphs of the External Trade Act authorizing restrictions would enable legal action to be brought to prevent these imports.

117. Although the Decree is not an intergovernmental agreement which the Federal Government is obliged to fulfil, total disregard of the Decree and its character as international law is at least a fact that could provoke a disruption of the peaceful coexistence of peoples or the foreign relations of the Federal Republic of Germany. The Council's rights as the legitimate trustee of Namibia's raw materials are being grievously violated. Consequently, is there a corresponding legal claim to a deletion of South Africa/

Namibia from the list of "A/B" countries and to the creation of a general law on the import of goods of all kinds from Namibia?

118. The system of legal protection under public law is confined to a right of appeal to which anyone whose rights have been infringed can resort in order to obtain a reversal of an administrative act. A recourse to administrative tribunals is available to obtain enforcement of an authorization, to appeal against the content of restrictions and impositions and to obtain revocations. All decisions taken by the Federal Office for Trade and Industry can, therefore, be fully re-examined.

119. In the case of Namibia, it is a matter of changing the import list in such a way that all imports from Namibia are prohibited. This would only be possible through the issuance of a corresponding ordinance.

120. The standardized summary of the facts required by the legislature for a restriction on foreign trade and payments, namely, a "serious impairment of foreign relations" or "peaceful coexistence of peoples", are indeterminate legal concepts. The Government can interpret or evaluate the issue in such a case and decide at its own discretion whether to issue a regulation putting into force restrictions on foreign trade. If the Government refrains from issuing such a regulation in such a case, it is only politically accountable. Any inaction on its part would not come under any control of the administrative courts. If the Government issues an ordinance restricting foreign trade, however, the administrative courts can then undertake judicial review of such an ordinance.

121. It can thus be concluded that any legal steps available to restrict trade are closely bound up with the External Trade Act. Whether the Government acts in Namibia's case according to the Decree is a political and legislative question not falling within the jurisdiction of the administrative courts.

*Question (e)*

122. No specific section of the lawyer's report is devoted to question (e). As indicated in the first paragraph under question (c) above, however, the lawyer has stated that there does exist, in the case of the importation of Namibian resources, the possibility of direct and immediate application of criminal law.

*Question (f)*

123. The lawyer notes that uranium entering the Federal Republic of Germany is the property of EURATOM, which has the exclusive right to control the acquisition and consumption of nuclear fuel. It is highly disputed what EURATOM property means. In the case of a legal dispute, the national courts would have to submit the question to the Court of Justice of the European Communities in Luxembourg. The prevailing view on EURATOM property seems to be that it is in fact full legal property and that consumers have a right to use it. This might cause certain difficulties.

124. Interesting perspectives, both legally and politically, can be found in a community-wide legal action to enforce the Decree at the EEC level. Any action of EURATOM concerning Namibian uranium can be submitted by those involved for examination by the EURATOM Commission by those

involved. Appeal to the European Court is possible against actions of the Commission. The Commission can be sued by anyone in certain cases of inactivity.

*Question (g)*

125. The report indicates that at least two years would be required for a case to go through all instances.

D. JAPAN

126. The report on the legal situation in Japan was prepared by a Japanese lawyer who is familiar with the attempts to prevent the importation into Japan of Namibian uranium.

127. In the introduction to his report, the lawyer indicates that, in Japan, it is generally accepted that there is a clear-cut distinction between private international law and public international law, although a given problem might involve both dimensions. In particular, legal action based on the Decree would be almost exclusively covered under Japanese private international law.

*Question (a)*

128. The lawyer reports that, on the question of who the plaintiff should be, it seems appropriate to choose the United Nations Council for Namibia *per se*. The legal standing of the Council could be accepted under Japanese law. Under article 36 of the Civil Procedure Code of Japan, foreign juridical personalities shall enjoy the same private rights as those of the same classes of juridical personalities in Japan.

129. While the status of the Council is not exactly the same as that of an administrative division of a State, it has been generally accepted that an established international organization can legally act as an independent juridical personality in Japan as if it were an administrative division of a State. Therefore, the Council would be accepted as a foreign juridical personality having the capacity of a party.

*Question (b)*

130. The lawyer deals only briefly with this question, indicating that it would be desirable to take the position that the Decree is the domestic law of Namibia. He adds that on 19 December 1974, Mr. Haruo Okada, a representative of the opposition Japan Socialist Party, interpellated ministers of the Japanese Government in the Diet on whether the Japanese Government would approve the anticipated application for import (in violation of the Decree) of Namibian uranium, despite the conventional policy of the Government to abide by United Nations resolutions. Mr. Miyazawa, Minister without portfolio, admitted, *inter alia*, that the Decree had binding power on the Japanese Government, notwithstanding its lack of compulsory power as pertaining to the Security Council resolutions empowered under Article 25 of the Charter of the United Nations, and also pronounced that the proposed uranium contract was undesirable to Japan since it was contrary to the Government's policy of co-operating with United Nations resolutions as a matter of principle. Those statements, which tacitly implied refusal of



the expected application for the importation of Namibian uranium provoked cancellation of the direct contract between Rössing Uranium Ltd., and the Kansai Electric Power Company.

*Question (c)*

131. The report indicates that return of the Namibian uranium should be chosen as the object of the claim, in which case Japanese private international law would apply to the case. Under the rules, the plaintiff would have to argue the following two points:

- (a) The defendant is in possession of the object or subject-matter;
- (b) The plaintiff has the right of ownership of the subject-matter.

132. The plaintiff would then be faced with the most difficult questions to be solved, namely:

- (a) What is the object or subject-matter in this case?
- (b) What is the law that can establish the plaintiff's ownership of the said subject-matter at the time of trial?
- (c) The relationship between the above two questions.

Difficult questions would then arise as to the possible applicability of the law of Namibia in the state of Illinois in the United States of America (where the uranium is enriched) and in Japan, and also to the fact that the uranium changes its state from ore to hexa-fluoride to enriched uranium to fuel rods.

133. If litigation is instituted, the lawyer recommends that damages should be sought. This would allow other corporations to be brought into the case as accomplices.

*Question (e)*

134. The lawyer states:

"It can be said that almost all Japanese scholars specializing in private international law would agree that the problem of whether the Decree can establish the right of ownership of the subject matter in Namibia should be decided by whether the Decree is the prevailing law in Namibia, in spite of the *de facto* control of South Africa. Also, the laws of South Africa will surely not be chosen as the applicable laws in Japan, not because those laws have been enforced by such an illegally occupying state as South Africa . . . , but because they have been brought into Namibia from outside or they are not pertinent to the situation in Namibia. Can we then say that the Decree is the law pertinent to the place? Unfortunately, we cannot help saying that there is still some ambiguity regarding the Decree as the law to be chosen in this case. We need a simple and decisive rule to govern the right of ownership in Namibia, for example, something like article 239, paragraph 2, of the Civil Code of Japan, which provides that 'An immovable belonging to no person shall belong to the National Treasury'."

No doubt, the lawyer continues, it can be admitted that the Decree tacitly implies, or stands on, the same premise as the Japanese law mentioned above. Such an argument, however, is too weak to persuade Japanese courts that the Decree has rigid grounds for application.

135. Furthermore, with regard to the questions involving applicability of Namibian, United States and/or Japanese law, the lawyer reports that at present one cannot expect anything but an ambiguous outcome.

*Question (f)*

136. The lawyer does not go into this question, but he notes that in addition to litigation by the Council, there are other possibilities.

*Question (g)*

137. Information is not provided on the question of the duration of the proceedings.

*Other questions*

138. In his response to question (e) the lawyer states that part of the problem is the language of the Decree itself. In his concluding remarks, he recommends that the United Nations Council for Namibia should enact another decree or regulation, which would establish the right to seek damages against any person, entity or corporation engaged in detrimental activities against the people of Namibia, including mining, refining, transportation, processing and consuming the natural resources of the territory.

E. NETHERLANDS

139. The report on the legal situation in the Netherlands was prepared by a practising lawyer. The report is principally devoted to the question of Namibian uranium.

*Question (a)*

140. The report does not go into detail on this question, but makes it clear that either the United Nations Council for Namibia or the Commissioner would have standing in domestic courts in the Netherlands.

*Question (b)*

141. The lawyer states that:

(a) The Netherlands voted in favour of General Assembly resolution 2145 (XXI) of 27 October 1966;

(b) The Netherlands has accepted the advisory opinion of the International Court of Justice of 21 June 1971;<sup>4</sup>

(c) During the 1980/81 session of the Committee on Foreign Affairs and Nuclear Energy, the Minister for Foreign Affairs of the Netherlands stated that the Kingdom of the Netherlands recognizes the competence of the United Nations Council for Namibia to enact decrees.<sup>23</sup>

<sup>23</sup> It should also be noted that, on 17 January 1984, the Netherlands Government informed a mission of consultation of the United Nations Council for Namibia that it recognized the Decree and was willing to co-operate in its implementation to the extent possible under its natural law (see A/AC.131/134, para. 19).

142. With regard to the binding nature of the Decree, the lawyer states that this would be one of the main legal issues in any litigation in a Netherlands Court. In Netherlands law, there is very strict separation between legislative and judicial powers. The function of a Netherlands judge is to interpret the law independently without being influenced by the point of view of the Government. The opinion of the Government on a legal issue is therefore theoretically without any influence on the outcome of the litigation.

143. There is no unanimity as to which rules of international law are directly applicable in the Netherlands. It is certain, however, that several decisions of the Security Council are binding. It can also be argued that the Decree is directly applicable in the Netherlands and therefore it can be applied (in a legal action against those contravening it) by a court of law.

144. Even if the Decree is not considered as directly binding, it can still be applied indirectly under Netherlands law, in such a manner that contravention of its provisions would be considered as a tort. Furthermore, if the Decree is looked upon as not being a binding order of a United Nations organ, it can still be seen as the lawful act of a foreign authority. This authority is of a special nature because most of the States involved participated in its creation and all of them, including the Netherlands, were addressees of several United Nations resolutions requesting the full application of the Decree.

145. The above opinion, the lawyer states, has been strongly supported by several eminent Netherlands legal experts in articles and lectures. It also finds support in Netherlands case-law concerning the applicability of foreign laws.

#### *Question (c)*

146. The report examines the possibilities not of confiscation of Namibian uranium, but of a legal decision to prohibit the use of uranium given by a company that is taking it, using it and/or processing it in the Netherlands.

147. It is pointed out in the lawyer's report that neither the Government of the Netherlands nor members of the Board of Urenco<sup>24</sup> have ever denied the fact that Namibian uranium is indeed enriched in the plant. This fact has also been admitted by a previous Minister for Foreign Affairs in Parliament and members of the Urenco Board in several press statements. Legal action against Urenco could therefore be based on:

<sup>24</sup> According to information contained in the report of the Council on the hearings on Namibian uranium (A/35/24, vol. III), Urenco is a uranium enrichment company operating under the aegis of the Federal Republic of Germany's private company Uranit, the Netherlands company Ultra-Centrifuge Nederland (UCN) (of which the Netherlands Government owns some 98 per cent of the shares) and the United Kingdom State-controlled British Nuclear Fuels, Ltd. (BNFL). It was established in accordance with the Treaty of Almelo, to which the Governments of the three above-mentioned countries were signatories. The three partners each control an enrichment plant: BNFL has its factory at Capenhurst in the United Kingdom and Uranit and UCN both operate plants at Almelo in the Netherlands. A so-called joint committee, in which each partner has a representative, takes the policy-making decisions and is, therefore, responsible for the enrichment contracts signed by Urenco.

(a) Contravention by Urenco of the Decree as being directly applicable in the Netherlands;

(b) The fact that Urenco is committing a deed of complicity in contravention of article 1 of the Decree.

148. The lawyer states that even if the Decree is not considered as being directly applicable in the Netherlands, it can be argued on good grounds that the enrichment by Urenco is a deed of complicity in the unlawful extraction and exportation of Namibian uranium, i.e. a deed of complicity in direct contravention of paragraph 1 of the Decree. The above deed of complicity can be considered as an act of tort. The Council or Commissioner is therefore entitled to claim a court order to stop Urenco from using and/or processing Namibian uranium and/or claiming damages.

149. The lawyer mentions that a former Minister for Foreign Affairs of the Netherlands, while admitting that Namibian uranium was being enriched in the Urenco factory, declared that it would be impossible for the Government to prevent the processing of Namibian uranium for two reasons:

(a) The factory is obliged under the Treaty of Almelo<sup>25</sup> to accept all uranium regardless of its origin;

(b) Uranium that is being sent to the factory has already been processed abroad in such a way that it would be technically impossible to distinguish uranium of Namibian origin from the uranium from other sources.

150. The report notes that, contrary to what the Minister said, the Treaty does not oblige Urenco to accept every uranium order under all circumstances. Furthermore, the status of the Treaty under international law is clearly inferior to the status of the Charter of the United Nations on which the authority of the United Nations Council for Namibia, and thus the status of the Decree, is based.

151. The second argument, that of the technical impossibility of distinguishing Namibian uranium from that of other sources, is unlikely to prevent the issuance of a court order. Before its being made indistinguishable, the uranium has been processed elsewhere. Urenco would, therefore, be able to prevent Namibian uranium from entering its factory by requiring documents of origin from its customers. It might even be possible for the Council or the Commissioner to seek the prohibition of the processing of all uranium offered to Urenco in case the customers cannot confirm that the uranium is not of Namibian origin.

#### *Question (e)*

152. The lawyer states that no advocate in the Netherlands could ever tell his client that he would undoubtedly win the case. However, considering the legal theory in the country and the position of the Council and the Decree under international law, there is more than a fair chance that legal action would end in a court order forbidding the use of Namibian uranium.

153. This opinion is based on the assumption that Urenco would not deny that it is processing Namibian uranium. If Urenco should deny this, it would be impossible to assess the chances of success.

<sup>25</sup> United Nations, *Treaty Series*, vol. 795, No. 11326, p. 275.

*Question (f)*

154. The lawyer does not propose any alternative actions.

*Question (g)*

155. The lawyer indicates that the envisaged legal action would be rather complicated. It is not unlikely that the defendant would use all possible legal means to delay the procedure and make every effort not to lose the case.

*Other questions*

156. The lawyer recommends that the United Nations Council for Namibia should ask an *advocaat en procureur* in the Netherlands (a) to request legal experts in the Netherlands to write opinions, each in their specific field of law, on the several specific issues that could arise during the envisaged litigation; and (b) to request some experts in the field of trade in uranium to give an opinion on the possibility of proving the fact that Urenco is taking in Namibian uranium.

157. With these opinions, it would be possible to weigh the collected evidence and take a final decision on whether to commence litigation.

158. The lawyer also notes that while Urenco is a Netherlands-based company and as such governed by Netherlands law, the structure of the company (a holding with several subsidiaries) is rather complicated. Consequently, more research would be needed as to which of the branches action should be taken against.

#### F. UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

159. The report on the situation in the United Kingdom was prepared by a team of British lawyers. In the United Kingdom there are regional variations in the law; the report deals with English law, which in practice is the law that would be concerned with questions involving Namibia.

160. In their introductory remarks, the lawyers state that the United Kingdom does not accept the advisory opinion of the International Court of Justice of 21 June 1971,<sup>4</sup> offering as a major reason the argument that the Security Council can only take decisions binding on Member States if such decisions have been taken under Article 39 of the Charter of the United Nations. As 1971 receded, the emphasis turned from detailed legal arguments to a more general reliance on the fact that advisory opinions are not binding.

161. The United Kingdom accepted that South Africa was in breach of the Mandate for South-West Africa. It doubted, however, that the General Assembly had the authority to revoke the Mandate and it argued that the Security Council resolutions affirming the Assembly's action were also without Charter foundation. Furthermore, these resolutions, and the requirements contained therein as to the severing of links with South Africa in respect of Namibia, were seen as resolutions that were not under the authority of Chapter VII of the Charter and thus, it was argued, not binding. The United Kingdom took the view that the General Assembly acted "beyond

its competence in setting up the United Nations Council for Namibia with the powers with which it purported to endow it".<sup>26</sup>

162. In 1974, the United Kingdom affirmed that South Africa, by its own conduct, had divested itself of any entitlement under the Mandate:

"The Mandate cannot be regarded as still alive and operative; and with the termination of the Mandate, South Africa's rights to administer the Territory have lapsed."<sup>27</sup>

163. The Government appeared to draw a distinction between the Mandate as an instrument giving rights to South Africa and the international status of Namibia, which continued regardless of the demise of the Mandate. In an important statement the Government added:

"Nevertheless, the international status of the Territory still continues, since no lawful basis exists or has ever existed upon which South Africa can or could have unilaterally altered that status."<sup>27</sup>

164. The Government here echoed earlier findings of the International Court of Justice that the international status exists *in rem*. In a critical passage, the Government concluded:

"The Government takes the view that South Africa is in occupation without title of a Territory which has international status. This occupation is unlawful and South Africa should withdraw. Meanwhile, South Africa remains *de facto* administering authority. However, in the circumstances, there is an obligation on States not to recognize any rights of South Africa to continue to administer the Territory. But there is no obligation, in the absence of appropriate decisions under Chapter VII of the Charter, to take measures which are in the nature of sanctions. It follows that we do not accept an obligation to take active measures of pressure to limit or stop commercial or industrial relations of our nationals with the South African administration of Namibia."<sup>28</sup>

165. In making the above observations, the lawyers state that the termination of the Mandate rests, in the view of the United Kingdom, not on General Assembly resolution 2145 (XXIX) of 27 October 1966 (which is recommendatory) or on Security Council resolution 276 (1970) of 30 January 1970 (which was not adopted under Chapter VII), but on the operation of the normal law of treaties which prescribes the loss of entitlement by South Africa because of its own conduct. The analysis, the lawyers observe, is not without its difficulties. If the argument is that South Africa has renounced the Mandate, no lawful basis exists for it to do so, and certainly not thereby unilaterally to alter the status of Namibia. If the argument is, as the lawyers believe it probably is, that South Africa has forfeited its rights because of its material breaches, other legal problems arise. A material breach of a multilateral treaty enables the other parties, by unanimous agreement, to terminate the treaty. But "the parties" to the Mandate are not all in existence today, and Assembly resolution 2145 (XXIX) adopted by the Supervising Authority rather than "the parties" was in any event not adopted unanimously.

<sup>26</sup> *Parliamentary Debates*, House of Commons (Hansard), 30 June 1982.

<sup>27</sup> *Ibid.*, 4 December 1974, col. 1565.

<sup>28</sup> *Ibid.*, cols. 1565-1566.

166. The lawyers thus note the United Kingdom's position while themselves expressing certain reservations on it. What is of importance, they state, is that the United Kingdom does not regard the Mandate as still in existence, with South Africa having duties under it which she is failing to fulfil. Rather, South Africa is regarded as being in illegal occupation, and having no further mandatory duties to fulfil. Its legal duty is one arising under general international law, namely, to withdraw.

167. The implication of the United Kingdom's view is that the Government regards South Africa as in illegal occupation, but none the less recognizes it as the *de facto* Government of Namibia. The Government's position would seem to be that while South Africa is not entitled to continue to administer the Territory, it is the effective Government and is thus entitled, as a matter of international law, to *de facto* recognition. There can be no doubt, the lawyers state, that this presents the greatest difficulties. It is well established that, as a matter of English law, the courts have traditionally given effect to internal legislation and executive acts of Governments which are recognized *de facto* and are in effective control.

168. Finally, the lawyers note that the British Government takes the view that because South Africa's occupation of Namibia is illegal, it is inappropriate to encourage or promote trade in respect of Namibia. At the same time, it has made it clear that it believes itself under no obligation to introduce prohibitions on trade, and that such commerce as takes place between private companies and Namibian bodies is compatible with the United Kingdom's obligation under international law.<sup>29</sup>

#### *Question (a)*

169. The lawyers report that in litigation in the United Kingdom, arguments would undoubtedly be advanced by any selected defendant that the United Nations Council for Namibia is "unrecognized" and, therefore, cannot avail itself of the English courts.

170. The lawyers believe that there are good arguments to rebut this. In their opinion, it is not necessary for the Council to claim a "governmental" capacity. Consequently, the question of recognition would not arise. Its claim as an Administering Authority would be based on its objective existence as a United Nations subsidiary organ. An individual State cannot negate the existence of a subsidiary organ, whether it voted for it or not, and that existence has certain legal consequences that individual States cannot ignore.

171. Although there may be reasonable prospects of satisfying the courts that the Council has the necessary standing to bring proceedings, the question is one of considerable complexity and uncertainty in the United Kingdom; the lawyers consider that the prudent path would be for the United Nations itself and the United Nations Council for Namibia to be joint plaintiffs.

172. From the perspective of the English courts, the capacity of the United Nations and its entitlement to sue in the English courts is fairly clear in principle, although, as is well-known, there is an absence of practice illuminating the scope of the principle.

<sup>29</sup> Official Statement, *Parliamentary Debates*, House of Commons (Hansard), 4 December 1974, col. 1566; and reply of Parliamentary Under-Secretary, *Parliamentary Debates*, House of Commons (Hansard), 20 July 1982, col. 95.

173. In addition to the Charter of the United Nations (Article 104), other instruments to which the United Kingdom is party have made more detailed provision on these matters (see the Convention on the Privileges and Immunities of the United Nations<sup>17</sup> and articles VII (1) and (2) of the articles of the Agreement of the International Bank for Reconstruction and Development), and in particular, have made clear that the United Nations has juridical personality, which includes the right to contract, to acquire and dispose of moveable and immoveable property and to institute legal proceedings. In the opinion of the lawyers, it is not yet wholly certain that the United Nations capacity to institute legal proceedings at the domestic level goes beyond contract and property matters. Clearly, the objectives and purposes of the envisaged litigation go considerably beyond the parameters of the *Reparation for Injuries Case* (1949), i.e., the protection of the United Nations own servants. The lawyers also believed that, for these reasons, the legal authority of the Secretary-General of the United Nations to act alone in litigation on the Decree without reference to the Security Council, should be considered to be in some doubt.

*Question (b)*

174. The British lawyers state that General Assembly resolutions are not of themselves binding and, furthermore, real difficulties exist in making these international legal obligations precise and in identifying their exact scope.

175. In so far as Security Council resolutions are concerned, and particularly Council resolution 276 (1970) of 30 January 1970, there are two issues: first, as to whether it is binding; and secondly, if it is, whether legal action could be taken in an English court for the failure of the United Kingdom to prohibit trade in natural resources with Namibia.

176. The Government of the United Kingdom takes the view that Security Council resolution 276 (1970) is not binding because it is not a resolution under the authority of Chapter VII of the Charter; the lawyers believe, however, that an English court would give due deference to the views of the International Court of Justice in its Advisory Opinion of 21 June 1971, and that it could be persuaded on this basis and in the light of other legal writings to treat this resolution as binding. The lawyers, however, do not expect an English court to take the next step of deciding that an obligation arising under the Charter automatically creates a domestic legal obligation without specific domestic legislation (in the present instance in any event).

177. As for the advisory opinion itself, the lawyers are of the opinion that an English court would consider that this advisory opinion is "not binding" in the sense that no legal action would lie against the United Kingdom by another State for refusal to accept it; but that it would be considered as being of the highest authoritative value, so that the English court might well adopt the International Court's views as its own.

178. By contrast, the lawyers believe that there is virtually no possibility that the courts would give effect to the acts of the United Nations Council for Namibia in respect of that Territory. Moreover, the Council is a body not recognized by the Government as having authority to legislate for Namibia, neither is it situated within the Territory nor controlling it.



179. The lawyers believe that persuasive arguments could be advanced in an English court that the General Assembly has inherent powers to establish a subsidiary body under Article 22 to pursue Charter purposes, and that the United Nations Council for Namibia has been duly established; that the Council's assumption of legislative power is a functional necessity and that the Decree is compatible with what the International Court of Justice has considered to be permissible *vis-à-vis* the Territory. There is, however, a contrary argument which could be raised, namely that the legislative authority of the Council must be exercised in such a way as not to amount in effect to the imposition of sanctions, this authority being reserved to the Security Council. The lawyers have argued in reply to this that the Decree flows from the findings of the International Court of Justice as to South Africa's lack of title and is not a usurpation of the Security Council's role in relation to sanctions.

180. It will therefore be seen that the legal status of the Decree in English law is questionable, although it is certainly arguable (but with no certainty as to the outcome) that it is properly enacted and does not impinge on the Security Council's functions. Even if the Decree is valid in the internal legal order of the United Nations, however, and even if this entails legal consequences for the Government of the United Kingdom (for example, to introduce the necessary legislation to ensure compliance by individuals and firms with its precepts), the lawyers are of the opinion that it cannot be the basis of a direct cause of action in the English courts unless and until it has been made part of English law, which has not been done. The lawyers further believe that, in the absence of domestic legislation, infringement of the Decree does not give rise to an offence under English law.

181. The lawyers have added their own views as to the position under general international law. The United Kingdom regards it as part of the law of the land without specific incorporation (as distinct from ratified treaties, which do require incorporation into English law by internal legislation). Any claim that may be made in regard to Namibia would thus benefit from being formulated on the basis of, or with major reliance being placed on, customary international law, and in particular, with the contention (which the lawyers believe an English court could be persuaded to accept) that both permanent sovereignty over natural resources and self-determination are principles of contemporary general international law.

#### *Question (c)*

182. The survey made by the lawyers leads them to the view that there are greater prospects in respect of a legal action structured to deny the validity of South African title over goods and resources in Namibia (where reliance would be made upon general principles of international law to identify where preferable title lay, given that the Territory has international status) rather than an action positively designed to give legal effect to the Decree. The lawyers consider the Decree to be merely a part of the available legal resources for the pursuit of a remedy and that what is required is a co-ordinated formulation of the arguments outlined above, embracing *inter alia* the points made about general international law, the advisory opinion of the International Court of Justice and Security Council resolution 276 (1970).

183. Furthermore, the Decree must be read as a whole, and provisions cannot really be taken from it in isolation. Some of the provisions may be

more helpful than others, however. So, for example, the lawyers consider that the seizure provisions in paragraphs 4 and 5 of the Decree would provide a useful basis for either initiating proceedings (i.e. by way of a claim through the English courts to seize material imported into the United Kingdom in breach of paragraphs 1 and 3) or for justifying a "seizure" which would force the individual or corporation from whom the material was "seized" to bring proceedings for recovery. (There would, however, be considerable practical difficulties in the latter course.)

*Question (e)*

184. In so far as the question of mounting action in the English courts may be concerned, the lawyers believe that it will be possible to formulate a claim which would not be struck out and to advance serious arguments in favour of it. There would certainly be difficulties in doing so, both as to the problem of status which the Council would have to face in bringing an action against a relevant corporation (although this problem would be minimal if the United Nations itself were willing to act as a co-plaintiff) and as to the merits themselves.

185. The lawyers see the analysis, as elaborated above, as forming the basis of an attractive line of argument: viz. the United Nations has authority, as a matter of Charter law, to pass resolutions on Namibia which have operative effect. It represents the only lawful authority acting on behalf of Namibia, South Africa being, as the Government of the United Kingdom concedes, an unlawful occupying Power. That being so, it has a better claim (whether itself suing as custodian or through its subsidiary organ, the United Nations Council for Namibia) to Namibian resources than has, for example, an extracting or importing British company. South Africa's right to dispose of assets in Namibia will not necessarily have to be recognized by an English court. This is not a sovereign act in its own territory since South Africa not only has no territorial title there, but Namibia has international status. This may allow one to circumvent the problem that English courts will normally give effect to acts of a *de facto* government. Further, the doctrines of *de facto* recognition and act of state may not indeed apply at all when the acts concerned violate international law as determined by the International Court of Justice.

186. The lawyers assume that a case can be formulated which would not be struck out for want of a cause of action, and that circumstances exist or arise which would render an action appropriate. In their opinion, reasonable prospects of success exist. In advancing this view, the lawyers emphasize, however, that the matter is one of considerable complexity, novelty and difficulty, and that it is quite impossible to assure the Council of an affirmative outcome. Each stage of the action would provide hurdles to overcome and while they can see arguments and a basis for meeting each such obstacle, it is also possible that the case could fall at any stage.

187. The lawyers add that it would be possible to show a reasonable cause of action that would allow a hearing to proceed. That, in turn, would allow the merits of the situation concerning Namibian resources to be aired in depth in a public forum.

*Question (f)*

188. The lawyers have reviewed a number of possibilities for alternative and/or complementary action.

189. In principle, individual Namibians will have access to the courts in exactly the same way as any other non-nationals; that is to say, in respect of a cause of action that falls within the jurisdiction of the English courts. Their ability to use the courts does not depend upon the "recognition" of their Government; and the United Kingdom view of the status of either South Africa or the United Nations Council for Namibia is irrelevant except in so far as the claim relies upon a public act of the authority concerned.

190. The United Kingdom Government has refused to endorse the General Assembly's description of SWAPO as "the sole and authentic representative of the Namibian people", believing that it would be inappropriate to do so in advance of elections. SWAPO would be viewed neither as a Government-in-exile nor as a body corporate, and would have no prospect of pursuing a successful action in the English courts.

191. Shareholders of an English company are entitled to sue in the English courts for the protection of the individual rights conferred upon them by the memorandum and articles of association. Such proceedings are brought effectively on behalf of the company against the directors on the grounds that they are acting in breach of their fiduciary duties to the company by the negligent, reckless or unlawful conduct of its affairs. Alternatively, minority shareholders who can show that the company's affairs are being, or have been, conducted in a manner which is prejudicial (or potentially prejudicial) to the interests of some of the members, including themselves, may petition the court for relief under section 75 of the Companies Act of 1980.

192. The lawyers do not consider that an English company importing or exporting goods in a manner incompatible with the Decree is acting in violation of English law. Consequently, a shareholder's writ to restrain such activity would not be likely to succeed. The alternative course of action under section 75 of the Companies Act of 1980, however, based on potential prejudice to minority shareholders by a reckless policy of trading with Namibia, might offer more scope, if brought in conjunction with a claim by the Council (or by any other appropriate plaintiff) seeking to secure compliance with the Decree.

*Question (g)*

193. The lawyers estimate that it would take two to three years to complete a trial, with an additional one and a half years if all levels of appeal were pursued.

*Other questions*

194. The lawyers indicate that factual investigations may be required before legal action is commenced.

#### G. UNITED STATES OF AMERICA

195. The legal study regarding the questions raised by Standing Committee II was carried out in the United States of America by a team of practising lawyers.

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196. In the introduction to their report, the United States lawyers indicate that, at various times, United States courts have resolved suits based on the enforcement of decrees similar to the Decree. During the Civil War, for example, United States courts were called upon to determine the validity of acts performed under the authority of the illegal, non-recognized, but *de facto* confederate states. Similarly, United States courts have given effect to decrees conserving economic resources of Governments forced into temporary exile during the Nazi aggression and occupation of the Second World War, where those Governments had been recognized by the United States Executive Branch. More recently, litigation involving ownership of oil in occupied Arab territories in the Middle East has taken place in United States courts.

197. The result of this litigation has been the creation of a body of established judicial rules and policies to determine, on the one hand, which exercises of authority over illegally occupied territory United States courts will respect, and on the other hand, what conditions and factors must obtain before United States courts will support the validity of foreign governmental decrees by enforcing them in a United States jurisdiction.

*Question (a)*

198. Under United States law, the United Nations Council for Namibia or the Commissioner, acting on behalf of the Council, would have legal standing to bring action in United States courts against those violating the Decree. The lawyers indicate that this conclusion is based on the following considerations:

(a) Article 104 of the Charter of the United Nations provides that in each Member State, the United Nations should have "such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes";

(b) In accordance with its treaty obligation under the Charter, a United States statute permits international organizations to sue in federal courts "to the extent consistent with the instrument creating them . . .". By executive order, the United Nations was specifically designated as one of the organizations entitled to enjoy the privileges conferred by the Act. The International Refugees Organization and the United Nations Children's Fund (UNICEF) have been permitted to institute suits under this Act. It should be noted, however, that each of these cases, in contrast to a suit to enforce the Decree, involved a relatively simple breach of contract without any overtones implicating United States foreign policy;

(c) As a duly authorized and established subsidiary organ of the United Nations which is charged with the responsibility of administering the Territory of Namibia until independence, the Council's action to enforce the Decree through a judicial process would satisfy the statutory requirements of section 288a(a)(iii) of the International Organizations Immunities Act;

(d) As the duly authorized trustee of the resources of Namibia, the Council would meet the test for standing outlined in *Harrington v. Bush*:

- (i) That the plaintiff has suffered injury in fact;
- (ii) That the interests being asserted are within the zone of interests to be protected by the statute or constitutional guarantee in question;
- (iii) That the injury is capable of being redressed by a favourable decision.

These requirements were more recently stated by the Supreme Court as follows:

"At an irreducible minimum, Article III [of the United States Constitution] requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and 'is likely to be redressed by a favourable decision'."<sup>30</sup>

(e) In the contemplated action, the Council would satisfy these requirements in that it would allege that it was injured by the wrongful deprivation by the defendant of the Council's right to possession of the natural resources of Namibia, and that such injury was caused by defendant's improper actions and is likely to be redressed by the court's decision in favour of the Council.

199. The Commissioner, who is elected by the General Assembly upon the nomination of the Secretary-General, would have authority to bring suit on behalf of the Council by virtue of paragraph 7 of the Decree, which authorizes him to take the necessary steps after consultations with the President of the Council. It is submitted that it would be advisable for the Commissioner to bring such an action jointly with the Council.

*Question (b)*

200. The lawyers state that a United States court would accept General Assembly resolution 2145 (XXI) of 27 October 1966 as a valid termination of South Africa's Mandate to administer Namibia.

201. The above resolution terminated South Africa's Mandate over Namibia. It thereby constituted an objective legal event. In general, United Nations General Assembly resolutions are in the nature of recommendations. Their terms do not mandate compliance or encroach on the sovereignty of Member States without their express consent. There are certain decisions of the General Assembly, however, which are endowed with full legal effect. In considering the powers of the General Assembly, the International Court of Justice stated clearly in its advisory opinion of 21 June 1971<sup>4</sup> that the General Assembly has the capacity to make decisions that have legal implications for Member States.

202. General Assembly resolution 2145 (XXI) by which the Assembly, as successor to the Council of the League of Nations, terminated South Africa's Mandate over Namibia, was one such resolution with "operative design". When, by that resolution the General Assembly terminated the Mandate, it took an action that was dispositive in character. The International Court of Justice has determined that the General Assembly resolution in this instance was valid and legally effective.

203. The General Assembly's powers with regard to the termination of South Africa's Mandate are in an area that is *sui generis*. The Assembly's power to terminate South Africa's Mandate and the legal consequences of that act are derived from the general principles of international law regarding the repudiation of treaties, rather than the limited terms of its decision-

<sup>30</sup> Valley Forge College v. Americans United for Separation of Church and State, Inc., *United States Reports* (1982), vol. 454, pp. 464 and 472.

making authority as defined by the Charter. The United States member of the International Court of Justice in a separate opinion in the opinion on Namibia, stated:

“The power was conferred on the General Assembly *aliunde* the Charter<sup>31</sup> through the unique situation posed by the Mandate coupled with the authority granted under Article 80 of the Charter, which constituted the bridge between the League of Nations and United Nations insofar as mandates were concerned.”

204. The United States view that General Assembly resolution 2145 (XXI) constituted a valid and legally effective act is well established. The United States voted in favour of Assembly resolution 2145 (XXI) and participated in establishing the duty of all States to recognize the illegality of South Africa's continued presence in and administration of Namibia. The United States voted in favour of both Security Council resolution 276 (1970) of 30 January 1970 and Council resolution 301 (1971) of 20 October 1971. As a permanent member of the Security Council, its negative vote could have blocked passage of the two resolutions. Further, the United States written pleadings and oral statement before the International Court of Justice are clear expressions of the United States recognition of the validity and effect of Assembly resolution 2145 (XXI).

205. There is no doubt that, taking note of the general principles of international law with regard to the termination of treaties, the advisory opinion of the International Court of Justice and the position of the Executive Branch on this issue, a United States court would accept and give appropriate effect to General Assembly resolution 2145 (XXI) as a valid termination of South Africa's Mandate to administer Namibia.

206. With regard to General Assembly resolution 2248 (S-V) of 19 May 1967, the lawyers point out that while the United States clearly recognizes the direct responsibility vested in the United Nations for administering Namibia, the United States abstained in the vote on this resolution, noting that certain functions envisioned in the resolution for the Council were not within the realm of practicality. The United States Department of State has made a series of statements that summarize the Executive Branch's view of Assembly resolution 2248 (S-V) and of the United Nations Council for Namibia. For example:

“United Nations General Assembly resolution 2248 (S-V) of 19 May 1967, which established the United Nations Council for Namibia, directed the Council to proceed immediately to Namibia, and granted it broad administrative powers, all of which were ‘to be discharged in the Territory’. We have interpreted this provision to mean that the Council can exercise its administrative powers only after it gains admission to the Territory. However, we cannot judge what position the courts would take should the Council seek legal recourse to enforce the decree.”<sup>32</sup>

207. It is probable that a United States court would follow the guidance of the Department of State on the question of the validity of resolution 2248 (S-V), which gives the United Nations the direct and sole authority to ad-

<sup>31</sup> That is, a power conferred on the General Assembly without reference to the Charter.

<sup>32</sup> Department of State Bulletin No. 38 (7 July 1975).

minister Namibia, as well as the Department's assessment that the Council cannot be characterized as "a government, a government-in-exile, or an interim government".

208. The lawyers declare that a United States court would accept the final conclusions of the 1971 advisory opinion of the International Court of Justice on Namibia.

209. United States courts have, on a few occasions, cited advisory opinions of the International Court of Justice as articulating principles of international treaty or customary law. There has been no case, however, in which a court relied on the ruling in an advisory opinion of the International Court of Justice for its conclusion.

210. To the extent that advisory opinions of the International Court of Justice are authoritative interpretations of international customary or treaty law, United States courts must treat them as part of the law of the United States.

211. The likelihood that a United States court would rely on the conclusions of the International Court of Justice in this case are [*sic*] increased by the fact that the Court's decision is in accord with the legal analysis of the United States Government on the same topic. However, while the United States Executive Branch has accepted the conclusions of the advisory opinion, it has taken the position that the specific consequences of the termination of the Mandate that were enumerated by the International Court of Justice and subsequent Security Council resolutions are not binding on the United States.

212. In all matters that touch on foreign relations, courts will give great weight to the views of the Executive Branch. Federal and state judiciaries are not, however, bound to the interpretation given by the Executive Branch in areas of international treaty and customary law. A court could take a divergent view of the weight to be given to the advisory opinion of the International Court of Justice, but it is highly unlikely that it would make a different interpretation.

213. With regard to the status of Security Council resolutions, the lawyers state that it is unlikely that a United States court would conclude that Security Council resolutions 283 (1970) and 301 (1971) confer rights on private litigants that are enforceable in United States courts in the absence of implementing congressional legislation or an executive order. A court may, however, cite these resolutions as authoritative evidence of the expectations of the international community as to the specific consequences of the termination of South Africa's Mandate to rule Namibia.

214. In any analysis of the status of Security Council resolutions in United States domestic law, the lawyers indicate that two questions must be considered:

(a) To what extent does the resolution create an international legal obligation binding on the United States under the Charter of the United Nations and United States treaty law? If resolutions 283 (1970) and 301 (1971) are not binding resolutions, they are, *a fortiori*, without effect in the United States;

(b) If a binding obligation is created, does it give rise to individual rights enforceable in the United States courts?

215. Because the Charter of the United Nations is a treaty and United Nations resolutions are extensions of it, Governments are bound *vis-à-vis* the Organization and other Governments to adhere to the terms of resolutions enacted under Articles of the Charter if, and only if, they authorize mandatory action. There has always been general agreement that Security Council resolutions enacted under Chapter VII of the Charter create binding obligations pursuant to Article 25 of the Charter.

216. The United States Department of State has been in accord with this view. For instance, Mr. Edward R. Stettinius, Secretary of State, in his report on the conference which adopted the Charter, said: "Decisions of the Security Council take on a binding quality only as they relate to the prevention or suppression of breaches of the peace". This view was also argued by the United States before the International Court of Justice in the Namibia case. The Court has spoken authoritatively to the binding nature under international law of such resolutions:

"Thus, when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for Member States to comply with that decision . . . To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter."<sup>33</sup>

The opinion of the Court, however, reached well beyond the United States position, namely, that Security Council decisions take on a binding character when they relate to prevention or suppression of breaches of the peace. The Court concluded that Article 25 of the Charter made Security Council resolutions on Namibia binding on States Members of the United Nations even though they were adopted by the Security Council acting other than under its Chapter VII authority. This conclusion has occasioned some dispute among commentators.

217. There is no evidence that by adopting Security Council resolutions 283 (1970) and 301 (1971) the Council considered itself to be acting under the authority of Chapter VII of the Charter; nor does the Council refer to Article 25 in these resolutions. The position taken by the United States Executive Branch has been that except for those provisions of the resolution which have legal force because of general principles of international law, the resolutions are not binding as a matter of treaty law. In explaining his affirmative vote for Council resolution 301 (1971), the resolution which endorsed the interpretation of the International Court of Justice that Council resolution 276 (1970) of 30 January 1970 had legal effect regardless of the fact that it was not an action under the authority of Chapter VII of the Charter, the United States [*sic*] accepted not the reasoning but rather the conclusions of the International Court of Justice in its advisory opinion of 1971 which declared that "Member States are under obligation to recognize the illegality of South Africa's presence in Namibia . . . and to refrain from any dealings with the Government of South Africa implying recognition of the legality of . . . such presence and administration. . . ."<sup>34</sup>

218. There is, therefore, no specific guidance from previous court decisions on whether Security Council resolutions 283 (1970) and 301 (1971)

<sup>33</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 54.



will be considered binding treaty obligations as an extension of the Charter, which, it should be noted, is an organic treaty, or even as executive agreements entered into under the aegis of the Charter. It is likely that the courts would take the most conservative approach and draw the conclusions endorsed by the Department of State. The courts may, however, consider these resolutions to be authoritative evidence and an elaboration of the expectations of the international community as to the termination of South Africa's Mandate over Namibia.

219. The lawyers report that United States courts may treat the Decree either as a positive law of Namibia promulgated by the only authority which can lawfully legislate in that Territory, or as a decree of the United Nations body which has *de jure* authority but lacks *de facto* control.

220. The legal and political history of the Territory, the lawyers state, is critical to an accurate determination of the legal status of the Decree. South Africa's original authority over the Territory now known as Namibia derived from a contractual relationship with the Council of the League of Nations.

221. With the establishment of the United Nations and the demise of the League, the supervisory functions over the mandated Territory previously exercised by the Council of the League were passed to the General Assembly of the United Nations. The General Assembly was empowered to exercise all the supervisory functions that the League might have exercised, including the power to terminate South Africa's administrative authority over the Territory upon the determination of a material breach of the terms of the Mandate by South Africa.

222. The General Assembly exercised this right by resolution 2145 (XXI), by which it terminated South Africa's administrative authority over Namibia and brought Namibia under the direct responsibility of the United Nations. In so doing, it acted in the capacity of the supervisory authority over the Mandate and as a party to a contractual or treaty relationship with South Africa.

223. By resolution 2248 (S-V), the General Assembly itself assumed the role and functions of the Administering Authority, as it was competent to do under Article 81 of the Charter of the United Nations, and established a subsidiary organ, the United Nations Council for Namibia, to exercise those functions under the authority of Article 22 of the Charter.

224. The Decree is fully within the scope of these provisions. It must be considered to be the domestic law of the Territory of Namibia, having been duly promulgated by the sole Administering Authority over the Territory, as established in conformity with Article 22 of the Covenant of the League of Nations and Article 22 of the Charter and as confirmed by subsequent opinions of the International Court of Justice and resolutions of the Security Council. As domestic legislation of the Territory, it is opposable to all other juridical personalities irrespective of consent on the part of those thus affected.

225. In the light of this United States recognition of the validity of the termination of the Mandate and the assumption by the United Nations of the Administering Authority over the Territory of Namibia, United States

courts might treat the Decree as a positive law of Namibia promulgated by the only authority that can lawfully legislate in that Territory.

226. In treating the Decree in this fashion, United States courts would not be in conflict with the position taken by the United States Executive Branch on the limited extent to which the power of the United Nations Council for Namibia to legislate within the Territory must be recognized by States, for two reasons. First, statements made by the United States Executive Branch on the powers of the Council show a reservation to recognize only those acts of the Council which cannot be given effect without *de facto* control of the Territory. To the extent to which the Decree anticipates enforcement in the domestic courts of other States, it does not fall into that category.

227. Secondly, statements of the United States Executive Branch have expressly reserved judgement on how the courts will or should treat the Decree. For example, a Department of State Bulletin of 7 July 1975 contained the following policy statement:

"The Department of State takes the position that enforcement jurisdiction regarding this Decree (No. 1) rests not on the Executive Branch but rather with the courts and parties involved. We cannot judge what position the courts would take should the Council seek legal recourse to enforce the Decree."

In a 1976 hearing before the House Sub-Committee on International Resources, Food and Energy, Mr. Nathaniel Davis, a State Department official, stated the position of the United States with regard to the Decree as follows:

"We have doubts about its effects in law. Ultimately, of course, courts in many countries may have the issue before them. I hesitate to predict what the interpretation of the courts might be.

"American businessmen should be aware of the potential impact of the decree."<sup>34</sup>

#### *Question (c)*

228. Paragraph 4 of the Decree, which authorizes the seizure and forfeiture of Namibian resources exploited in violation of the Decree, appears to the lawyers at first sight to be the most promising provision for legal action. One preliminary problem in enforcing paragraph 4 is that it appears to authorize such an action to be brought by any plaintiff seeking the seizure and forfeiture for the Council. United States courts require, however, that the complainant be a real party in interest.

229. There are three more substantial problems, however. First, paragraph 6 of the Decree states that those who contravene the terms of the Decree shall be liable for damages. The language of that paragraph complicates the scope of an action, however, because it might be interpreted as postponing the possibility of an action for damages by stating that the contravenor "may be held liable . . . by the *future* Government of an independent Namibia" (emphasis added). This apparent restriction is reinforced by paragraph 7, which is susceptible to an interpretation that the clause con-

<sup>34</sup> *Resources in Namibia: Implications for United States Policy*, Hearings before the House Subcommittee on International Resources, Food and Energy, Ninety-fourth Congress.

sciously and deliberately restricts the Commissioner to taking only those steps necessary to enforce paragraphs 1 to 5 (which include the seizure and forfeiture provisions), but not paragraph 6.

230. Secondly, the terms of the Decree purport to reach rights and entitlements granted by South Africa prior to the passage of General Assembly resolution 2145 (XXI). Any attempt to reach pre-1966 entitlements might be viewed as confiscatory and therefore not eligible to be given effect by United States courts.

231. Thirdly, paragraph 5, which authorizes the seizure and forfeiture of any vehicle or ship found to be carrying Namibian natural resources in violation of the Decree, might be interpreted as being penal in nature. United States courts will not enforce foreign penal laws.

*Question (e)*

232. Although the lawyers have indicated many positive elements in their analysis, such as previous decisions of United States courts regarding acts of unrecognized régimes, the acceptance of rules of international law regarding occupied territories, the "usufructuary" principle of the Hague Convention of 1907<sup>35</sup> and the dubious validity of any concessions granted by South Africa, the lawyers conclude that as regards the likely outcome of an action on the Decree, although there is a respectable legal rationale for judicial action giving effect to the Decree, there is a high probability that preliminary issues would enable the court to avoid examining the merits of the case. Since such a case would touch on matters of foreign policy, a court would probably find the case non-justiciable as involving political questions not appropriate for judicial determination and, similarly, the act of State doctrine might be applied to bar the court's consideration of the illegality of South Africa's acts in Namibia.

233. The conclusion of the lawyers is founded, with regard to justiciability, on the notion that the resolution of a territorial dispute between sovereigns (in this case, presumably between South Africa and the United Nations) could be seen as a political question of foreign relations, which is reserved to the Executive Branch in the context of the constitutionally-mandated separation of powers into executive, legislative and judicial functions.

234. Closely related to the issue of justiciability in this instance is the act of State doctrine, which is the policy of judicial abstention from inquiry into the validity of "public" actions of a foreign Government within its own territory and within the scope of its sovereign powers. The doctrine also arises out of the United States system of separation of powers and the placement of plenary foreign relations powers in the Executive Branch. A concession agreement, for example, between an investor and a Government covering mining rights within the territorial limits of that Government's juris-

<sup>35</sup> The substantive basis of the customary law of belligerent occupation governing property rights is provided by the Hague Convention of 1907. Under article 55, the Convention provides that *inter alia*: "The occupying nation shall consider itself merely as the administrator and usufructuary of the public buildings, real estate, forests, and farms. . .". Under these rules, an occupant may act only as a usufructuary in relation to State-owned natural resources. Even where limited use of public property is allowed, excessive or abusive exploitation is characterized as "waste" and will be forbidden.

diction would be an act of State within the meaning of the doctrine. If the act of State doctrine is held applicable, then reliance on rights ultimately acquired from South Africa could constitute a complete and sufficient bar to any further judicial consideration of the case.

235. After close consideration of the facts in that case, the United States lawyers concluded that an accurate analysis would lead a court to hold that neither the act of State doctrine nor the doctrine of the non-justiciability of political questions should bar an examination of the case on its merits.

236. It is not unlikely, however, that the Department of State would submit a communication to the court advising that the Department could not say that a ruling in this case would not embarrass the conduct of foreign policy by the Executive Branch, especially since sensitive negotiations with South Africa might be ongoing. Thus, the court would not feel free to examine the merits and could base its findings on an inaccurate assessment of the act of State doctrine and the doctrine of non-justiciability of political questions.

*Question (f)*

237. The United States lawyers see more merit in alternative legal strategies than in the type of action principally envisaged by the Council. The lawyers suggest replevin and/or conversion actions, both of which could be taken simultaneously.

238. Replevin, the lawyers indicate, is a possessory action at law for the recovery of specific personal chattel, which was wrongfully taken and/or detained. The basis for a replevin action by the Council would be the wrongful acquisition and/or detention, by the defendants, of Namibian natural resources to which the United Nations had a right of immediate possession. The Council would have to show, at a minimum, that it had itself, or the United Nations acting through it, some interest entitling it to immediate possession. The argument would be that the United Nations Council for Namibia had a superior right to possess the resources of Namibia, or at the least, a sufficient interest to defeat the purported title of any defendant.

239. Any property sought to be replevied must: (a) be identifiable; (b) be capable of delivery; and (c) be located within a geographical area where the court has jurisdiction over the property and the defendant is in possession of the property. The remedy is recovery of the wrongfully detained property. Monetary damages might also be awarded, however, for injury resulting from wrongful acquisition or detention.

240. Conversion is defined as any unauthorized assumption of dominion or ownership over personal property, belonging to another, to the exclusion of the owner's rights. The argument in the instant case would be that the United Nations had been injured by the acts of dominion or ownership exercised by the defendant over Namibia's natural resources because it had a superior right to Namibia's resources and defendant's acts had been inconsistent with the United Nations rights in the property. Therefore, if property could be identified and proven to have belonged to the United Nations at the time of its alleged conversion, an action might be brought for damages, even if the property had already been sold or otherwise disposed of.

241. Pursuing either or both alternative actions would preclude the need to rely solely on the Decree inasmuch as the superior right of the Council to exercise dominion over the natural resources of Namibia flows directly from General Assembly resolutions 2145 (XXI) and 2248 (S-V). To reach this conclusion, the court would need only to accept and to give effect to the termination of South Africa's Mandate over Namibia and to the United Nations' authority as the Administering Authority for the Territory and as trustee for the people of the Territory. This leads directly to the conclusion that the Council has a superior right to possess the goods.

242. Whereas in a cause of action based on the Decree the focus would be on the Council as the Administering Authority for Namibia, with legislative competence to promulgate the Decree, the focus of the alternative actions proposed would be on the Council as trustee of the Namibian people and of the natural resources of the Territory.

243. On examining the pros and cons of instituting the replevin act based upon presently known facts, the lawyers conclude that there might be so many difficulties in locating and identifying resources from Namibia that pursuing this cause of action only might not be fruitful.

244. Attaching natural resources taken from Namibia presents several difficulties. First, any goods attached must be specific and identifiable. Therefore, it would be necessary to maintain sufficient surveillance of trade in Namibian goods as to be reasonably certain that specific property currently located in the United States originated in Namibia. Secondly, given the rapidity with which goods are moved in commerce, the Council would be forced to act promptly to attach goods upon learning that a particular Namibian product had been located in the United States. Thirdly, if the resources originating in Namibia were, by the time they reached the United States, mingled with, and not reasonably severable from, non-Namibian property, there could be no valid attachment of Namibian property. Fourthly, since the court must have jurisdiction over both the property that is the subject matter of the action and the defendant, the ability of the Council, as plaintiff, to structure and control the nature of its case would be impaired since two important strategic decisions, the identity of the defendant and the court before which the case is to be brought, would be determined by the fortuitous circumstances of (a) who was in possession of the property; and (b) where the property was located when it was attached.

245. In the instant case, United States corporations engaged in taking, removing, shipping or selling goods which are part of the natural resources of Namibia would be liable as converters because they are assuming and exercising ownership over goods which rightfully belong to the United Nations Council for Namibia, as the trustee of Namibia and the lawful representative of the Namibian people. Since these corporations are transferring goods out of the country and utilizing them for their own purposes, the goods are being used to the exclusion of the Council's rights and defendants would be liable as converters.

246. The issues that must be explored in determining whether a cause of action for conversion is feasible, the lawyers state, are:

- (a) Identification of property allegedly converted;
- (b) Jurisdiction;
- (c) Law governing the cause of action;

- (d) Establishing title and/or right to possession in the Council;
- (e) Remedies;
- (f) Entities potentially liable for conversion:
  - (i) The conversion chain;
  - (ii) Intent;
  - (iii) Holding parent corporations liable for the acts of their subsidiaries;
- (g) Potential defendants.

247. Expressing views different from their opinion regarding the Decree, the lawyers conclude that although a conversion action by the Council would be a somewhat novel and unusual case, such actions are not unknown in the arena and the cause of action would be definitely worth pursuing.

248. In a conversion action, the Council would be able to sue anyone who participated in the conversion, a factor that would increase the number of potential defendants, make the selection of the appropriate forum easier and eliminate the need to determine the law of Namibia or to pierce the corporate veil. The greatest obstacles would be whether the case involved claims that either would not be considered justiciable or that would trigger the act of State doctrine. These obstacles, however, could probably be overcome.

249. The overall conclusion of the United States lawyers is that the Council should bring a possessory action, pleading as alternatives, the Decree, replevin, if the facts permit, and conversion. The relief requested would be return of the property and/or damages, for the unlawful taking and exercise of dominion and control, and an injunction<sup>36</sup> to prevent any further unlawful taking or appropriation by the defendants. The action should be against a defendant whose entitlement derived from the South African Government, purporting to be the Administering Authority in Namibia after the passage of General Assembly resolution 2145 (XXI). The defendant should also meet the criteria for a reachable defendant, as discussed above. It is recommended that the action not be based solely on the Decree because of the high probability, as indicated above, that United States courts would dismiss the action on the Decree as being non-justiciable, since it would require a judicial inquiry into both the authority of the Council and the merits of the Decree. On the other hand, a replevin/conversion action would only require an inquiry into the issue of which party, the plaintiff or the defendant, had superior title to the resources. Thus, an action pleading the Decree is recommended, or alternatively, replevin or conversion.

250. Notwithstanding the expected difficulties, the United States lawyers strongly urged the bringing of such an action for two reasons. The fact that success in obtaining a judgement from the court granting the prayer for relief cannot be guaranteed should not deter the attempt. Success in such a suit must be measured by a broader standard. First, it is the only way that

<sup>36</sup> An injunction, in United States law, is a remedy to restrain a person from doing something or commanding them to do something. They are provisional or preliminary if they are granted upon the filing of the suit, or while the suit is pending, to restrain the party enjoined from doing or continuing to do the acts complained of, until the suit is decided or upon further order of the court. In the present case, the intention would be to try to enjoin the defendants from continuing to exploit Namibian resources.



the principle of United Nations authority over Namibia and over its resources can be established. Secondly, it would have not only an inhibiting effect on United States corporations doing business in Namibia, but on transnational corporations generally.

*Question (g)*

251. The lawyers estimate that, including time for an appeal, at least three and a half years would be required. The lawyers add that it is certain that any suit would be defended vigorously.

*Other questions*

252. The lawyers report that SWAPO would have legal status to bring a case.

253. Arising out of difficulties with paragraph 6 of the Decree, it is implied that some new enactment by the Council might be advisable.

254. The lawyers also recommend that:

(a) The Council should seek information on imports into the United States of Namibian natural resources from professional sources;

(b) The Council might wish to devise a mechanism for registration of corporations doing business in Namibia and then seek judicial enforcement of the requirement;

(c) The Council might usefully add a penalty clause to the Decree and notify corporations in violation of the Decree that fixed penalties are being assessed and compounded periodically. This would lay a necessary foundation both for a stockholder's derivative suit against corporate directors for waste of corporate assets and provide a basis for computation of damages by the future lawful government of Namibia;

(d) The Council might enact special conservation measures for depletable resources to prevent wasteful and/or excessive exploitation and notify concerned corporations that they are expected to abide by the measures. The Council might seek judicial enforcement of the measures.

## II. OBSERVATIONS

255. The Commissioner wishes to make the following observations:

(a) The Commissioner notes that the Council stated in its report to the thirty-fifth session of the General Assembly<sup>10</sup> that the Decree was both the domestic law of Namibia and an instrument carrying international consequences for States Members of the United Nations;

(b) The Commissioner notes that if legal action is undertaken, it will have the effect of furthering the purpose of the Decree; equally, if legal action is not undertaken, it will be difficult to maintain the Decree in its present status, and it will be necessary to re-define it, possibly as a text to be incorporated in legislation at the national level;

(c) The Commissioner considers that the proposed legal action would reassert the constitutional and political status of the Council as the legal Administering Authority for Namibia until its independence;

(d) After a thorough study of the reports of lawyers from seven countries, the Commissioner considers that the proposed legal action might lead to

positive results if undertaken in one or more of the following three countries: Belgium, the Netherlands and the United States of America;

(e) In the light of the numerous options put forward by the various lawyers, the possibility of *pro bono* representation in some countries and the question of a possible role for non-governmental organizations in litigation, the Commissioner finds that it will not be possible to provide information about the cost of legal action until the Council has taken a decision, at least in principle, on the path that it wishes to follow;

(f) The Commissioner notes that in some, but not all, countries SWAPO would have legal standing to bring litigation to protect the natural resources of Namibia;

(g) In their studies, the lawyers sought precedents in the situation pertaining to other situations of illegal occupation. While citing certain cases from the Second World War involving already-recognized Governments that, although virtually intact, went into exile, the lawyers were unable to find any contemporary cases of occupied territories that were relevant. It appeared that, once again, the case of Namibia was *sui generis*;

(h) A number of other ideas were put forward by the lawyers. For example, in one country it was pointed out that "disclosure actions" might be undertaken in domestic courts, with a view to obtaining information not otherwise available that could be used by United Nations organs or non-governmental organizations in their work;

(i) The Commissioner has received only limited information regarding the legal situation at the level of EEC. The question of what is the legal role of EURATOM with respect to uranium imported into EEC and, in particular, the question of whether EURATOM may, in principle, be the legal owner of such uranium, was raised by the lawyers in the Federal Republic of Germany and the Netherlands. On the other hand, the lawyers in Belgium, where EEC has its principal offices, did not raise the question, because they concerned themselves with Namibian resources in general, and Namibian uranium may not be an issue in Belgium. Accordingly, in order to complete the assignment entrusted to him by Standing Committee II, the Commissioner has requested a legal study of the questions raised by Standing Committee II with respect to EEC;

(j) If the Council were to decide to include the possibility of legal action in its programme of work for the year 1986, it would become necessary to request the General Assembly at its fortieth session, to provide funds for that purpose. As an initial allotment, \$US 250,000 might be requested.

## ANNEX

### DECREE NO. 1 FOR THE PROTECTION OF THE NATURAL RESOURCES OF NAMIBIA\*

Conscious of its responsibility to protect the natural resources of the people of Namibia and of ensuring that these natural resources are not exploited

\* The following is the text of the Decree adopted by the Council at its 209th meeting, on 27 September 1974, approved by the General Assembly at its 2318th meeting, on 13 December 1979 (resolution 3295 (XXIX)), and published in the *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 24 (A/35/24)*, vol. I, annex II.



to the detriment of Namibia, its people or environmental assets, the United Nations Council for Namibia enacts the following decree:

#### DECREE

*The United Nations Council for Namibia,*

*Recognizing* that, in the terms of General Assembly resolution 2145 (XXI) of 27 October 1966, the Territory of Namibia (formerly South West Africa) is the direct responsibility of the United Nations,

*Accepting* that this responsibility includes the obligation to support the right of the people of Namibia to achieve self-government and independence in accordance with General Assembly resolution 1514 (XV) of 14 December 1960,

*Reaffirming* that the Government of the Republic of South Africa is in illegal possession of the Territory of Namibia,

*Furthering* the decision of the General Assembly in resolution 1803 (XVII) of 14 December 1962 which declared the right of peoples and nations to permanent sovereignty over their natural wealth and resources,

*Noting* that the Government of the Republic of South Africa has usurped and interfered with these rights,

*Desirous* of securing for the people of Namibia adequate protection of the natural wealth and resources of the Territory which is rightfully theirs,

*Recalling* the advisory opinion of the International Court of Justice of 21 June 1971,<sup>a</sup>

*Acting* in terms of the powers conferred on it by General Assembly resolution 2248 (S-V) of 19 May 1967 and all other relevant resolutions and decisions regarding Namibia,

*Decrees that:*

1. No person or entity, whether a body corporate or unincorporated, may search for, prospect for, explore for, take, extract, mine, process, refine, use, sell, export, or distribute any natural resource, whether animal or mineral, situated or found to be situated within the territorial limits of Namibia without the consent and permission of the United Nations Council for Namibia or any person authorized to act on its behalf for the purpose of giving such permission or such consent;

2. Any permission, concession or licence for all or any of the purposes specified in paragraph 1 above whenever granted by any person or entity, including any body purporting to act under the authority of the Government of the Republic of South Africa or the "Administration

<sup>a</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16.*

of South West Africa" or their predecessors, is null, void and of no force or effect;

3. No animal resource, mineral, or other natural resource produced in or emanating from the Territory of Namibia may be taken from the said Territory by any means whatsoever to any place whatsoever outside the territorial limits of Namibia by any person or body, whether corporate or unincorporated, without the consent and permission of the United Nations Council for Namibia or of any person authorized to act on behalf of the said Council;

4. Any animal, mineral or other natural resource produced in or emanating from the Territory of Namibia which shall be taken from the said Territory without the consent and written authority of the United Nations Council for Namibia or of any person authorized to act on behalf of the said Council may be seized and shall be forfeited to the benefit of the said Council and held in trust by them for the benefit of the people of Namibia;

5. Any vehicle, ship or container found to be carrying animal, mineral or other natural resources produced in or emanating from the Territory of Namibia shall also be subject to seizure and forfeiture by or on behalf of the United Nations Council for Namibia or of any person authorized to act on behalf of the said Council and shall be forfeited to the benefit of the said Council and held in trust by them for the benefit of the people of Namibia;

6. Any person, entity or corporation which contravenes the present decree in respect of Namibia may be held liable in damages by the future Government of an independent Namibia;

7. For the purposes of the preceding paragraphs 1, 2, 3, 4 and 5 and in order to give effect to this decree, the United Nations Council for Namibia hereby authorizes the United Nations Commissioner for Namibia, in accordance with resolution 2248 (S-V), to take the necessary steps after consultations with the President.

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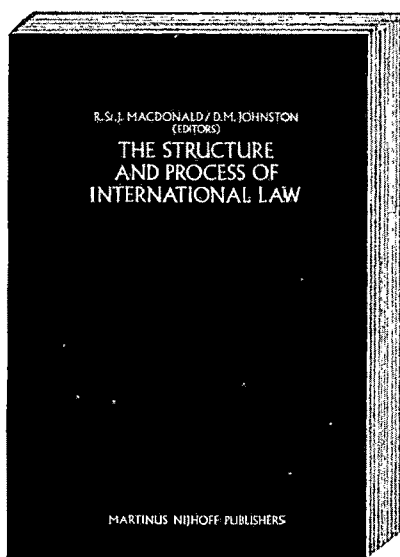
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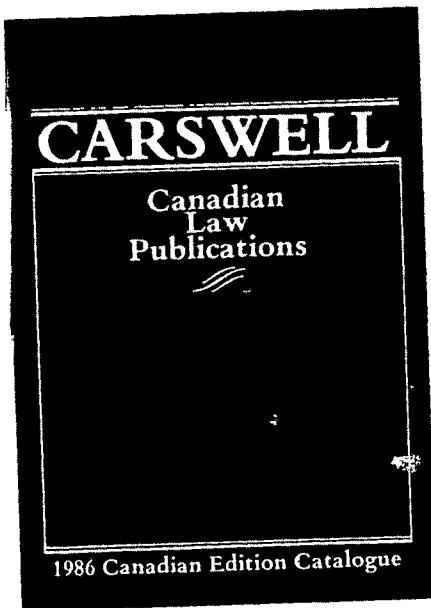
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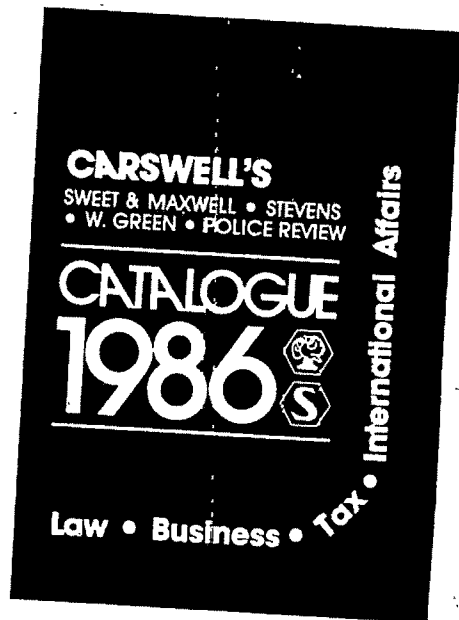
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